Supreme Court of the United States

OCTOBER TERM, 1961

No. 158

WILLARD CARNLEY, PETITIONER

vs.

H. G. COCHRAN, JR., DIRECTOR OF THE DIVISION OF CORRECTIONS, FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX

[fol. 1]

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE

WILLARD CARNLEY, PEARL CARNLEY, PETITIONERS

vs.

H. G. COCHRAN, JR., Director, Division of Corrections, Tallahassee, Florida, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

Comes now the petitioners herein, WILLARD CARNLEY and PEARL CARNLEY, in their own and proper persons, without counsel and presents to this Honorable Court that:

I

They are presently illegally restrained of their lawful liberty in definance of the Declaration of Rights of Florida, Chapters I, II, and also secured to them by the "equal protection" and "due process" clauses of the 14th Amendment to the U. S. Constitution.

II

The petitioners were arrested November 5, 1957 and held until September 8; 1958 when they waived jury trial, and were tried and sentenced before a jury of six, September 19, 1958, to serve Six Months to Twenty Years in Prison, predicated on an information filed August 11, 1958, a certified true copy of which is affixed hereto and made a part hereof.

III

Petitioner Willard Carnley is *completely without education* and cannot recount the A.B.C.'s. Petitioner Pearl Carnley possesses a minimal sixth grade education. Neither possesses the most elimentary rudiments of criminal procedure or foreknowledge with which to conduct a defense.

[fol. 2] Petitioners have no knowledge of any warrant or capias, neither were they presented with same nor was such a paper served or read to them at any time, the petitioner Willard Carnley being held in solitary confinement for a period of five (5) months. Neither were they advised of their right to arraignment without unnecessary delay, pursuant to the requirements of Chapter 901.06 and 901.23 F.S.A.

IV

Being held without a charge filed against them from November 5, 1957 to August 11, 1958, violated the Speedy Trial provision of Chapter II, also the remedy of due course of law Chapter IV, Bill of Rights. Owing to their inexperience they were deprived of their right to defend life and liberty as assured them in Chapter I.

V

Your petitioners requested a lie detector test in Court on September 19, 1958.

Petitioners requested defense counsel and protested their innocence and inability to conduct a defense, which same inability was outstandingly manifest at the farce of a trial when both petitioners tried to question the prosecutrix as to who conceived the idea of the criminal prosecution against them whereupon the Court peremptorily ordered their victims to sit down.

VI

The prosecution charged that inception occurred during the alleged incest. Still, no medical doctor was called to testify; the petitioner asked for blood tests to prove medically the parentage of the alleged child, the Court denied this right to prove innocence. The prosecution waited until the alleged child was born to allege the crime to fix the date of the alleged crime to correspond with the pregnancy period. In other words, petitioners were [fol. 3] jailed and held from November 5th, 1957, until August 11th, 1958, so the prosecution could find something to charge their victims with.

VII

In Wood V. State, 19 So. 2d—P.972-876; this Court declared that a fair and impartial trial contemplated "counsel" compulsory attendance of witnesses and time in which to prepare for trial, and committed the Court to this doctrine, with the observation that *any steps short* of these several requirements defeat the spirit of the law; all people as far as the law is concerned "must" stand on an equality before the bar of justice in every American Court; Chambers V. Florida 309 U.S. 227, 241. The fundamental requisite of "Due process of law" is notice and opportunity for a full and complete hearing; Carrigg V. Anderson, 9ALR 2d, 545, 167. Kan. 238, 205 P 2d, 1004; State V. Sax, 18 ALR 2d 929 Minn. 42 NW 2d 680: It cannot be assumed that petitioners were given a "hearing" within the requirements of justice when they could not prepare a defense and were incompetent to conduct one single essential of a legal defense.

Courts of competent jurisdiction have held without exception that a Court is devoid of jurisdiction when the demand for counsel is denied the poor. See: Re: Barry, 136 U.S. 597603; Frank V. Mangum 237 U.S. 303, 327; Commonwealth V. Gresham 244 SW (KY) 66; Storti V. Massachusetts, 183 U.S. 138, 143, 22, Sec. 72, 46 L.Ed. 120; Hack V. State, 141 Wisc., 346; quoted in Zellers V. State, 189 So. 236, 138 Fla. 158; Sneed V. Mayo 66 So. 2d 865. The Supreme Court in Powell V. Alabama 287 U.S. 45, and ex parto Riggins (CC) 134 Fed. 404, 418, established a standard of justice intended to be all pervasive. See "1 Cooley Const. Lim 8th Ed. 7C; E. G. People V. Napthaly 105 Cal. 641, 644, 39 Pac. 29; Cutts V. State of Florida, 54 Fla. 21, 23, 45, So. 491: Martin V. State, 51 Ga. 567, 568, 1 Am. Crim. Rep. 563; Sheppard V. State 165 Ga. 460, 464, 141 S. E. 196; State V. Moore, 61, Kan. 732, 734, 60 Pac., 748: State V. Ferris, 16 La. Am., 424. The "due process of law" clause of [fol. 4] the 14th amendment is mandatory in design and is therefore enforceable prescribing a criterion of ordered liberty without which a Court is utterly devoid of jurisdiction; See, Chambers V. Florida supra, Francis V. Rosweber 329 U.S. 459; Pallo V. Comm. 301 U.S. 319;

Gibbs V. Burke 337 U.S. 773; Commonwealth V. Gresham 244 S.W. (KY) 661 Kennard V. Louisiana, 92 U.S. 480. When it is shown that the defendant is incapable of defending himself, the Courts *must appoint* counsel for indigent defendants. Zellars V. State, as cited supra.

VIII

Certainly the details heretofore related cannot be Florida's concept of equal justice for all. See, Barbier V. Connelly, 113 U.S. 27 (1885); Yick Wo V. Hopkins; Griffin V. Illinois 351 U.S. 12; Levitious C.19 V.15; Harvey V. Elliott, 167 U.S. 409; Lane V. Wilson, 307 U.S. 268; Cole V. Arkansas 333, U.S. 196, 201; Dowd V. U.S. ex rel, Cook, 340 U.S. 206, 208; Cochran V. Kansas, 316, U.S. 255, 257; Frank V. Mangum, supra. It is essentially conductive to lawn self respect to recognize candidly the considerations that give prospective content to the law as embodied in these citations consonant with the spirit of our law. It is not to be thought of in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid, "*no court could be respected or respect itself to sit and hear such a trial*".; Webb V. Baird, 6 Ind. 13, 18; Betts V. Brady 316 U.S. 455, 462.

IX

There was no crime on petitioners part, the reprehensible dereliction of the Court alone convicted and illegally and unlawfully imprisoned their indignent victims.

X

The two crimes of fondling, and incest cannot co-exist [fol. 5] as alleged in the affixed information as the act of fondling as described in the purview of the Florida Statute is a prerequisite to and a distinct unit of the act of incest, in this respect the act of accessory before the fact is an invalid fallacy.

Prayer

The petitioners therefore pray that this Honorable Court issue the Writ of Habeas Corpus and submit this cause to a Court of Competent jurisdiction with counsel of their choice assigned in their just defense and/or issue an order to the Respondent that they be freed of their unlawful detention instanter and proceed hence without delay.

Respectfully submitted,

/s/ Willard Carnley
Willard Carnley

/s/ Pearl Carnley
Pearl Carnley

[fol. 6] EXHIBIT TO PETITION

"A True Copy"

IN THE COURT OF RECORD IN AND FOR ESCAMBIA COUNTY, FLORIDA

68-614 September 19, 1958

STATE OF FLORIDA

VS.

WILLARD CARNLEY
PEARL CARNLEY

1st. Ct. INCEST (Willard Carnley)
2nd. Ct. FONDLING (Willard Carnley)
3rd. Ct. ACCESSORY BEFORE THE FACT TO INCEST (Pearl Carnley)
4th. Ct. ACCESSORY BEFORE THE FACT TO FONDLING (Pearl Carnley)

Now on this day came in person and without counsel, the defendants Willard Carnley and Pearl Carnley into open court and after being duly arraigned the defendant Willard Carnley entered his plea of not guilty to Incest and Fondling as charged in the first and second counts of the information filed herein against him and the defendant Pearl Carnley entered her plea of not guilty to accessory before the fact to Incest and Accessory Before the Fact to Fondling as charged in the third and fourth counts of the information filed herein against her.

WHEREUPON CAME A JURY of six good and lawful men of Escambria County, Florida, to-wit:

1. James D. Roberts
2. John D. Kittrell
3. Eugene O. Kittrell
4. Paul A. Shelby
5. Ernie Newton
6. R. V. White

who were duly elected, empannelled and sworn to well and truly try this cause. After witnesses were sworn, the taking of testimony was begun and concluded and after hearing all the evidence, argument of counsel and the charge of court, the Jury retired to consider its verdict and thereafter returned into Court the following verdict, to-wit:

"case no. 58-614

STATE OF FLORIDA

vs.

WILLARD CARNLEY
PEARL CARNLEY

[fol. 7] /s/ John D. Kittrell
Foreman"

WHEREFORE, the Jury finding you, Willard Carnley, guilty of Incest and Fondling as charged in the first and second counts of the information herein and the Jury finding you, Pearl Carnley guilty of Accessory before the fact to Incest and Accessory before the fact to fondling as charged in the third and fourth counts of the information herein, the Court adjudges you to be guilty of said offense as charged. On being asked by the Court whether or not they had anything to say why sentence of the law should not be pronounced on them, each say nothing.

It is the judgement and order of the Court that you and each of you, Willard Carnley and Pearl Carnley, for your offenses, be imprisoned by confinement and committed to the custody of the Division of Corrections for a term of six (6) months to twenty years (20), said sentence to begin and run from date of incarceration in the Escambia County Jail.

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: LEAH WARE
Deputy Clerk

[fol. 8] EXHIBIT TO PETITION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA

IN THE COURT OF RECORD OF
ESCAMBIA COUNTY, FLORIDA

52,930 At the July Term thereof, 1958

John L. Reese, County Solicitor for the County of Escambia, Prosecuting for the State of Florida, in said County, charges that

WILLARD CARNLEY

On the 10th day of July

in the Year of Our Lord, One Thousand, Nine Hundred and fifty-seven at and in Escambia County, Florida, being then and there the father of Carol Jean Carnley, and within the degree of consanguinity within which marriages are declared by law to be incestuous and void, and then and there knowing the said Carol Jean Carnley to be his daughter, did then and there unlawfully, feloniously and incestuously have sexual intercourse with the said Carol Jean Carnley, against the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

SECOND COUNT: And your informant aforesaid, prosecuting as aforesaid, on his oath aforesaid, further information makes, that WILLARD CARNLEY on the 10th day of July, 1957, at and in Escambia County, Florida, did handle, fondle and make an assault upon Carol Jean Carnley, a female child, then under the age of fourteen years, in a lewd, lascivious and indecent manner, without intent to commit rape upon such child, by then and there placing his hands and private sexual parts upon and against the private sexual parts of said female child, against the form of the Statute in such case made and

provided, and against the peace and dignity of the State of Florida.

THIRD COUNT: And your informant aforesaid, prosecuting as aforesaid, on his oath aforesaid, further information makes, that WILLARD CARNLEY, on the 10th day of July, 1957, at and in Escambria County, Florida, being then and there the father of Carol Jean Carnley, and within the degree of consanguinity within which marriages are declared by law to be incestuous and void, and then and there knowing the said Carol Jean Carnley to be his daughter, did then and there unlawfully, feloniously and incestuously have sexual intercourse with the said Carol Jean Carnley, and PEARL CARNLEY, late of the county of Escambria aforesaid, before the committing of the felony aforesaid, to-wit: On July 10, 1957, with force and arms at and in the county of Escambia aforesaid, did unlawfully and feloniously counsel, hire and otherwise procure the said Willard Carnley to do and commit the said felony in the manner and form aforesaid, against the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

FOURTH COUNT: And your informant aforesaid, prosecuting as aforesaid, on his oath aforesaid, further information makes, that WILLARD CARNLEY, on the 10th day of July, 1957, at and in Escambia County, Florida, did handle, fondle and make an assault upon Carol Jean Carnley, a female child then under the age of fourteen years, in a lewd, lascivious and indecent manner, without intent to commit rape upon such child, by then and there placing his hands and private sexual parts upon and against the private sexual parts of said female child, and PEARL CARNLEY, late of Escambia County aforesaid, before the committing of the felony aforesaid, to-wit: on July 10, 1957, with force and arms at and in the County of Escambia aforesaid, did unlawfully and feloniously counsel, hire and otherwise procure the said Willard Carnley to do and commit the said felony in the manner and form aforesaid against the form of the

State in such case made and provided, and against the peace and dignity of the State of Florida.

/s/ John L. Reese
County Solicitor,
Escambia County, Florida

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: Leah Ware /s/
Deputy Clerk

[fol. 9] • • • •

[fol. 10] IN THE
SUPREME COURT OF FLORIDA

January Term, A. D. 1960

WILLARD CARNLEY, PEARL CARNLEY, PETITIONERS

VS.

H. G. COCHRAN, JR., Director, Division of Corrections, RESPONDENT

WRIT OF HABEAS CORPUS—June 16, 1960

In the Name and By the Authority of the State of Florida to H. G. Cochran, Jr., Director, Division of Corrections, Greeting:

You are hereby commanded that you have the bodies of Willard Carnley and Pearl Carnley by you illegally detained and imprisoned, as it is said, and that you forthwith before the Justices of the Supreme Court of Florida, produce the said Willard Carnley and Pearl Carnley in the City of Tallahassee, instanter, and that you do and receive what shall then and there be considered and determined concerning the said Willard Carnley and Pearl Carnley and otherwise comply with the orders of this Court and that you then and there have this Writ and make due and proper return thereto.

WITNESS the Honorable Elwyn Thomas, Chief Justice of the Supreme Court of Florida, and the Seal of said Court, at Tallahassee, the Capital, on this the 16th day of June, 1960.

/s/ [signature illegible]
Clerk of the Supreme Court of Florida

[fol. 11] IN THE
SUPREME COURT OF FLORIDA

WILLARD CARNLEY, PEARL CARNLEY, PETITIONERS

VS.

H. G. COCHRAN, JR., Director, Division of Corrections,
RESPONDENT

RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

Respondent, for return to the writ of habeas corpus heretofore issued herein, says:

I

He held petitioner Pearl Carnley pursuant to a commitment issued by the Court of Record in and for Escambia County, Florida, on September 19, 1958. A true copy of such commitment is attached hereto as Exhibit "A".

II

He no longer has legal custody of petitioner Pearl Carnley inasmuch as the said petitioner has been placed [fol. 12] on parole and is therefore subject to the supervision of the Florida Parole Commission. Attached hereto as Exhibit "A-1" is a certified copy of the certificate of parole of said petitioner.

This petitioner, although a parolee, and, as such, not physically confined in prison in the custody of this respondent, is so restrained of her freedom that she can maintain a habeas corpus proceeding in an effort to secure her discharge from the supervision of the Florida Parole Commission. *Sellers* vs. *Bridges*, 153 Fla. 586, 15 So. 2d 293. Therefore, the Florida Parole Commission joins in this return insofar as the same pertains to the petitioner, Pearl Carnley.

III

He holds petitioner Willard Carnley pursuant to a commitment issued by the Court of Record in and for

Escambia County, Florida, on September 19, 1958. Attached hereto as Exhibit "B" is a true copy of such commitment.

IV.

The aforesaid commitments are predicated upon a judgment and sentence entered by the Court of Record [fol. 13] in and for Escambia County, Florida, on September 19, 1958. Attached hereto as Exhibit "C" is a true copy of such judgment and sentence.

V

The entry of the aforementioned judgment and sentence was occasioned by the petitioners being found guilty by a jury of the crimes with which they were charged in the information filed against them. Attached hereto as Exhibit "D" is a true copy of said information.

VI

Following the filing of the aforesaid information on August 11, 1958, the clerk of the Court of Record in and for Escambia County, Florida, issued a capias for Pearl Carnley on August 15, 1958, and a capias for Willard Carnley on August 15, 1958. The sheriff's return endorsed on the backs of the aforesaid capiases indicated that the same were executed by placing the petitioners in the County Jail of Escambia County, Florida, on August 18, 1958. Attached hereto as Exhibit "E" and "F" are true copies of such capiases.

[fol. 14]

VII

The petitioners were originally arrested on November 5, 1957, pursuant to warrants issued by the County Judge's Court for Escambia County, Florida, and were held pursuant to such warrants for action by the grand jury. Attached hereto as Exhibit "I" is a true copy of the said warrants.

VIII

The aforesaid warrants were predicated upon affidavits charging that the petitioner Willard Carnley had com-

mitted the crimes of rape and fondling and that the petitioner Pearl Carnley was a principal in the first degree. Attached hereto as Exhibits "G" and "H" are true copies of such affidavits.

IX

On August 8, 1958, the grand jury returned an indictment charging the petitioner Willard Carnley with the crime of incest and the petitioner Pearl Carnley as a principal in the first degree. Attached hereto as Exhibit "J" is a true copy of such indictment.

[fol. 15]

X

Following the return of such indictment, the information attached hereto as Exhibit "D" was filed and appropriate proceedings were thereby instituted in the Court of Record in and for Escambia County, Florida.

XI

He admits that petitioners waived jury trial. See Exhibit "D". However, the trial court is not required to dispense with a jury where it is waived by a defendant and, notwithstanding such a waiver, the trial court may disregard it and require that the evidence be submitted to a jury as was done in the instant case. *Jones vs. State*, 155 Fla. 558, 20 So. 2d 901.

XII

He denies that petitioners were totally unable to defend themselves in the trial.

He denies that petitioners requested defense counsel.

He denies that the trial court pre-emptorily ordered the petitioners to sit down when they attempted to inter-

[fol. 16] rogate the witness against them.

He denies that petitioners requested a lie detector test.

He denies that petitioners requested that blood tests of the baby born to the prosecuting witness be taken to prove the parentage of such child.

He affirmatively alleges that petitioners actively participated in the conduct of the trial with both interrogat-

ing witnesses against them, both making opening statements to the jury and with both making closing arguments to the jury.

He further alleges that the petitioners were carefully instructed by the trial court with regard to the rights guaranteed by both the *Constitution of Florida* and the *Constitution of the United States* and with regard to the procedures to be followed during the course of the trial.

In support of all of the above, respondent attaches hereto as Exhibit "K" a certified copy of the transcript of the testimony taken at the trial of which petitioners now complain.

[fol. 17]

XIII

Petitioners' complaints that their case was not considered as speedily by the grand jury as they would now wish is highly immaterial at this juncture inasmuch as the grand jury did act and the petitioners, therefore, received that to which they were entitled, viz: consideration by the grand jury.

XIV

Petitioners also contend that the crime of fondling and the crime of incest constituted but one crime. In this connection, it should be noted that while found guilty of all counts of the information filed against them, petitioners were sentenced to imprisonment in the Florida State Prison for a term of six months to twenty years and by the terms of such sentence, given credit for the time which they had spent in the Escambia County Jail since their initial arrest on November 5, 1957. See Exhibi "C". The sentence imposed is within the maximum prescribed by law for the crimes with which petitioners were charged and found guilty inasmuch as *Section 801.02, Florida Statutes*, provides that the crimes of incest, fondling (lewd and lascivious behavior) when said acts were committed with a person 14 years or under, shall be included under the provisions of *Chapter 801*, [fol. 18] *Florida Statutes*. See also *Buchanan* vs. *State*, Fla., 111 So. 2d 51. *Section 801.03, Florida Statutes*, provides that anyone convicted of an offense within the

meaning of *Chapter 801* may, in the discretion of the trial Judge, be sentenced to a term not to exceed 25 years in the State Prison. The trial court having adjudged the petitioners guilty of all crimes charged in the information filed against them and having sentenced them to only one sentence within the legal maximum provided by law for each of such crimes, has obviously already decided this issue in the petitioners' favor.

XV

Respondent denies all allegations of the petitioners which are not expressly admitted herein.

Wherefore, respondents, having made return to the writ of habeas corpus heretofore issued herein, respectfully moves the court that said writ be quashed and petitioners remanded to the custody of the respondents.

Respectfully submitted,

H. G. Cochran, Jr.
Director, Division of Corrections

[fol. 19]

Francis R. Bridges, Jr.
Chairman

Raymond B. Marsh
Joseph Y. Cheney
As and constituting the Florida Parole Commission

By:
Francis R. Bridges, Jr.
Chairman, Florida Parole Commission
Respondent

Richard W. Ervin
Attorney General

B. Clarke Nichols
Assistant Attorney General
Counsel for Respondents

Certificate of Service
(omitted in printing)

[fol. 20] EXHIBIT "B" TO RETURN

White Male

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS
COURT OF RECORD

(Court)

ESCAMBIA County. September Term, 1958

Conviction for (Offense)—1st ct. Incest; 2nd ct. Fondling
Date of conviction—September 19, 1958
Date of sentence imposed—September 19, 1958
Term of sentence—six (6) months to twenty (20) years

58-614

STATE OF FLORIDA, PLAINTIFF

VS.

WILLARD CARNLEY, DEFENDANT

In the Name and By the Authority of the State of Florida, to the Sheriff of Said County and the Division of Corrections of Said State, Greeting:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

(Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director,

superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Kirke M. Beall
Judge of said Court, as also Ernie Lee Magaha
Clerk, and the Seal thereof, this the 19th day
of September, 1958

/s/ Ernie Lee Magaha
Clerk of said Court

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

[fol. 21] EXHIBIT "F" TO RETURN

IN COURT OF RECORD
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

WILLARD CARNLEY

To All and Singular the Sheriffs and Constables of the State of Florida, Greeting:

These are to command you to take Willard Carnley if he be found in your County, and him safely keep, so that you have his body before the Judge of our Court of Record, at the Court House in Pensacola, in Escambia County, on the instante day of July term of the Court of Record 1958 to answer an information found and now pending in said Court of Record, for said County, for

1st ct: Incent
2nd ct: Fondling

and have then and there this writ with due return of your action endorsed thereon.

WITNESS: ERNIE LEE MAGAHA, Clerk, and the seal of said Court of Record at Pensacola, this 15th day of August 1958.

(SEAL)

ERNIE LEE MAGAHA
Clerk Court of Record

By: /s/ Leah Ware, D. C.

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: /s/ Leah Ware
Deputy Clerk

No. 58-614 Sheriff 52,930 9-9-58

IN COURT OF RECORD
ESCAMBIA COUNTY, STATE OF FLORIDA

The Clerk of the Court will issue subpoenas for:

P. H. Bell and Officer Jernigan, c/o Sheriff's Office
Carol Jean Carnley, 3900 W. Morano St.
James Willard Carnley, 3900 W. Morano St.
Mrs. Mary C. Renfro, The Welfare Dept.,
Pensacola, Fla.

to be and appear before the Judge of our Court of Record, Escambia County, Florida, in the Court of Record Building, at Pensacola, on Friday, the 19th day of September A.D., 1958, at 9:00 o'clock A.M., to testify and the truth to speak in behalf of the STATE OF FLORIDA, in a certain matter before our said Court pending and undetermined, wherein the State of Florida is plaintiff and Willard Carnley and Pearl Carnley are the defendants.

/s/ John L. Reese
Solicitor, Court of Record

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: /s/ Leah Ware
Deputy Clerk

[fol. 22] No. 58-614

IN COURT OF RECORD
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA

vs.

WILLARD CARNLEY

CAPIAS
Bond fixed at $1500.00

ERNIE LEE MAGAHA
Clerk

By /s/ Leah Ware, D. C.

Received this Capias on the 15th day of Aug. A.D., 1958 and executed the same by placing one Willard Carnley, the within named prisoner, in the County Jail of Escambia County, Florida, on the day of 18th Aug. A.D. 1958.

/s/ Emmett Shelby
Sheriff

By /s/ [illegible]
Deputy Sheriff

[fol. 23] EXHIBIT "G" TO AFFIDAVIT

10-31-57 Fondling, Carnal interc. unmarried fe.

Docket No. 42563

IN COURT OF COUNTY JUDGE
ESCAMBIA COUNTY

STATE OF FLORIDA

VS.

WILLARD CARNLEY

c/o Percy Wilson, Portland, Florida

Bound over to await action of Grand Jury on
Rape & Incest Charges

No Bond

WITNESSES: [illegible]

LILLIAN L. DUFRESNE

AFFIDAVIT

Filed 1st Day of November A. D., 1957

HARVEY E. PAGE
County Judge

AFFIDAVIT

IN THE COUNTY JUDGE'S COURT
STATE OF FLORIDA

Before me, HARVEY E. PAGE, County Judge in and for said County, personally came Lillian L. Dufresne who being duly sworn, says that on the 31st day of October A. D. 1957 in the County aforesaid, one Willard Carnley, did then and there unlawfully have carnal intercourse

with one; Carol Jean Carnley, an unmarried female who was then and there at the time of such intercourse under the age of eighteen years, towit; 11 yr and of previous chaste character.

Willard Carnley, did handle, fondle and make an assault upon, Carol Jean Carnley, a female child under the age of 14 years in a lewd, lascivious and indecent manner without intent to commit rape on such child by then and there placing his hand and private sexual part upon and against the private sexual parts of said female child contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

/s/ Lillian L. Dufresne
Asst. Juvenile Counselor

Sworn to and subscribed before me this 1st day of November A. D., 1957

/s/ Harvey E. Page
County Judge, Escambia County

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: /s/ Leah Ware
Deputy Clerk

[fol. 24] EXHIBIT "1" TO RETURN

WARRANT

IN COUNTY JUDGE'S COURT
STATE OF FLORIDA
ESCAMBIA COUNTY

STATE OF FLORIDA

vs.

WILLARD CARNLEY

In the name of the State of Florida, to the Sheriff or any Constable of said County:

Whereas, Lillian L. Dufresne has this day made oath before me that on the 31st day of October A. D. 1957 in the County aforesaid, one Williard Carnley, did then and there unlawfully have carnal intercourse with one; Carol Jean Carnley, an unmarried female who was then and there at the time of such intercourse under the age of eighteen years, towit; 11 yr and of previous chaste character.

Willard Carnley, did handle, fondle and make an assault upon, Carol Jean Carnley, a female child under the age of 14 years in a lewd, lascivious and indecent manner without intent to commit rape on such child by then and there placing his hand and private sexual part upon and against the private sexual parts of said female child. contrary to the statute in such case made and provided, and against the peace and dignity of the State of Florida.

These are therefore, to command you to arrest instanter the said Williard Carnley and bring him before me to be dealt with according to law.

Given under my hand and seal, this 1st day of November A. D. 1957.

/s/ Harvey E. Page (SEAL)
County Judge, Escambia County

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: /s/ Leah Ware
Deputy Clerk

WARRANT

IN COUNTY JUDGE'S COURT
STATE OF FLORIDA
ESCAMBIA COUNTY

STATE OF FLORIDA

vs.

PEARL CARNLEY

In the name of the State of Florida, to the Sheriff or any Constable of said County:

Whereas Lillian L. Dufresne has this day made oath before me that on the 31st day of October A. D. 1957 in the County aforesaid, one Pearl Carnley did maintain and assist Willard Carnley the principal or accessory before the fact and did give the said Willard Carnley aid, in the unlawful carnal intercourse with one Carol Jean Carnley age 11 years, and did aid the said Willard Carnley to handle, fondle and make an assault upon Carol Jean Carnley, a minor, age 11 years.
contrary to the statute in such case made and provided, and against the peace and dignity of the State of Florida.

These are therefore, to command you to arrest instanter the said Pearl Carnley and bring her before me to be dealt with according to law.

Given under my hand and seal, this 1st day of November A. D. 19

/s/ Harvey E. Page (SEAL)
County Judge, Escambia County

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: /s/ Leah Ware
Deputy Clerk

[fol. 25] Docket No. 42563

IN COURT OF COUNTY JUDGE
ESCAMBIA COUNTY
STATE OF FLORIDA

STATE OF FLORIDA

VS.

WILLARD CARNEY w/m

c/o Percy Wilson, Portland, Florida

WARRANT

Filed 7 day of Nov. 1957

/s/ Harvey E. Page
County Judge

Filed day of 19

Clerk Criminal Court Record

Received the within warrant at Pensacola, Florida, on the 5th day of Nov. A. D. 1957 and executed the same in Escambia County, Florida, on the 5th day of Nov. A. D. 1957 by arresting the within named Willard Carnley and bring him into court.

/s/ Emmett Shelby
Sheriff

By /s/ P. G. Bell
Deputy Sheriff

Docket No. 42562

IN COURT OF COUNTY JUDGE
ESCAMBIA COUNTY
STATE OF FLORIDA

STATE OF FLORIDA

vs.

PEARL CARNLEY

c/o Percy Wilson, Portland, Florida

WARRANT

Filed 7 day of Nov. 1957

/s/ Harvey E. Page
County Judge

Filed day of 19

Clerk Criminal Court Record

Received the within warrant at Pensacola, Florida, on the 5th day of Nov. A. D. 1957 and executed the same in Escambia County, Florida, on the 5th day of Nov. A. D. 1957 by arresting the within named Pearl Carnley and bring him into court.

/s/ Emmett Shelby
Sheriff

By /s/ P. G. Bell
Deputy Sheriff

[fol. 26] EXHIBIT "J" TO RETURN

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA

In the Circuit Court of the First Judicial Circuit of the State of Florida in and for Escambia County

At the Spring Term thereof in the Year of Our Lord One Thousand, Nine Hundred and Fifty-eight

The Grand Jurors of the State of Florida, lawfully selected, impaneled and sworn, inquiring in and for the body of the County of Escambia upon their oaths as Grand Jurors, do present that on the 10th day of July in the year of our Lord, One Thousand, Nine Hundred and Fifty-seven at and in the County of Escambia, State of Florida

WILLARD CARNLEY AND PEARL CARNLEY who are within the degrees of consanguinity within which marriages are prohibited or declared by law to be incestuous or void, whereby Willard Carnley did commit fornication with his daughter, Carol Jean Carnley, who was within the degrees of consanguinity as prohibited by law, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Florida.

SECOND COUNT:

And your informant aforesaid, prosecuting as aforesaid, upon his oath aforesaid, further indictment makes, that on the 10th day of July, 1958, at and in the County of Escambia, State of Florida, WILLARD CARNLEY AND PEARL CARNLEY did handle, fondle and make an assault upon a female child, to-wit: Carol Jean Carnley, under the age of fourteen (14) years, to-wit: thirteen (13) years of age, in a lewd, lascivious and indecent manner, without intent to commit rape upon said female child

Contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Florida.

/s/ [signature illegible]
State Attorney for the
First Judicial Circuit of the State of Florida.

A True Copy:

ERNIE LEE MAGAHA, CLERK
COURT OF RECORD

By: /s/ Leah Ware
Deputy Clerk

[fol. 27] No. .....

Bond set $1,000.00 each defendant

CIRCUIT COURT OF
ESCAMBIA COUNTY

THE STATE OF FLORIDA

vs.

WILLARD CARNLEY and PEARL CARNLEY

INDICTMENT FOR

1. Incest
2. Fondling

A TRUE BILL

/s/ Peter Kaston
Foreman

Presented in open Court by the Grand Jury and filed in the presence of the Grand Jury, this 8 day of August A.D. 1958

/s/ Langley Bell, Clerk
/s/ Ed Wicke

By /s/ J. A. Flowers, D. C.

WITNESSES FOR THE STATE

Carol Jean Carnley
James Willard Carnley

[fol. 28] EXHIBIT "K" TO RETURN

IN THE COURT OF RECORD IN AND FOR
ESCAMBIA COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

vs.

WILLARD CARNLEY and PEARL CARNLEY, DEFENDANTS

This case came on to be tried before the Honorable Kirke M. Beall, one of the Judges of the above named Court, on the 19th day of September, A. D. 1958, and the following proceedings were had:

APPEARANCES

For the State:
Hon. William S. Cummins
Hon. Tom E. Lewis

For the Defendants:
None

COLLOQUY BETWEEN COURT AND DEFENDANTS

THE COURT: Mrs. Carnley, and Mr. Carnley, as the Court has advised you, you can either make an opening statement now to the jury as to what you intend to prove or you can reserve the right to make an opening statement until the conclusion of the State's case. Would you indicate to the Court which you would rather do. Mrs. Carnley, would you like to make an opening statement to the jury now or would you rather wait until the State has completed their case?

[fol. 29] MRS. PEARL CARNLEY: Well, this here statement, Your Honor, what that I intend to make, that is, that I am not aware of any indication like that of my daughter, and then, too, I can—

THE COURT: Do you wish to make the statement now or do you wish to reserve the right until the State has completed the case? Either of you can do as you like. In other words, one of you can make an opening statement now and the other one make it at the conclusion of

the evidence or both of you can wait until the conclusion of the State's evidence to make your opening statement or both of you can make your opening statement now.

MRS. PEARL CARNLEY: Well, I believe I will just wait and hear what the State has got to say and then I will tell my side of the story.

MR. WILLARD CARNLEY: Yes, sir, I will, too.

THE COURT: The Court will make an announcement that before this witness testifies the law requires the Court to clear the court room of spectators. You are all free to remain outside and will be called back after this witness testifies, if you would like to come back. The Court orders each of you who are not Court officers or parties to the action to go outside.

[fol. 30] CAROL JEAN CARNLEY, a witness in behalf of the State, who after being first duly sworn testified as follows:

DIRECT EXAMINATION BY MR. WILLIAM S. CUMMINS:

Q. Carol Jean, tell the Court and Jury your name, please.

A. Carol Jean Carnley.

Q. How old are you, Carol Jean?

A. Fourteen.

Q. How old were you on July the 10th of the past year, 1957?

A. I was thirteen.

Q. You were thirteen then?

A. Yes, sir.

Q. Carol Jean, is this your father and mother, are these your father and mother? (Indicating the defendants)

A. Yes, sir.

Q. That is, the defendants Willard Carnley and Pearl Carnley, they are your father and mother?

A. Yes, sir.

Q. Have you ever had intercourse with your father? Do you know what I mean by intercourse, sexual intercourse?

A. Yes, sir.

Q. Now, when was the first time that you had intercourse with him?

A. Chumuckla.

[fol. 31] Q. Chumuckla, Florida? That is near Jay, isn't it?

A. Yes, sir.

Q. How old were you then?

A. I was eleven years old.

Q. Do you know about what date you first had intercourse with him?

A. No, sir, I do not.

Q. Was it within the past two years?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. Well, where were you all living in Chumuckla when you first had intercourse with him?

A. We was renting a house from Mr. Ed. I don't remember his last name.

Q. And what happened, exactly?

A. Well, Daddy was drinking that night, and I was a big girl then and I hadn't ever quit wetting on the bed yet, and Daddy told me to take off my pants so I wouldn't wet, and that night it all happened. He took me in the room next—you walk right in right straight across the hall to another room, and he had the gun and he threatened Mother.

Q. He threatened your mother?

A. Yes, sir.

[fol. 32] Q. What did he say to your mother, do you remember?

A. Well, he didn't want her to come in there or try to stop him. If she had tried, he would undoubtedly have shot her with the gun.

Q. Now, Carol Jean, did you have intercourse with him that night? Did his private sexual parts go into yours?

A. Well, he tried, but I guess I just wasn't ready for that kind of thing, and I kept hollering to him to quit. See, he tried.

Q. Now, later on did he penetrate?

A. Yes, he kept trying and eventually he did.

Q. Now, after you lived in Chumuckla where did you live after that?

A. We moved to Allentown.

Q. Alentown?

A. Yes, sir.

Q. How long were you in Allentown?

A. Well, it happened in Allentown about once or twice. I believe the first time it happened in Allentown Mother was gone. I don't know where she was gone to.

Q. Now, where did you move after you left Allentown?

A. To a little town. I don't recollect the name.

Q. Berrydale?

A. Yes, Berrydale.

[fol. 33] Q. And then where did you move after that?

A. To Jay.

Q. Back to Jay? Did you ever more over to Escambia County, Century?

A. Yes, sir, we moved from Jay to Century.

Q. How long have you been living in Century, or how long did you live in Century?

A. We moved there close to Christmas.

Q. That was in 1956?

A. Yes, I believe so.

Q. Now, after you moved to Century did your father have any intercourse with you there, any sexual intercourse.

A. Yes, sir.

Q. Now, that is Century, Florida, in Escambia County, Florida, isn't it?

A. Yes, sir.

Q. It is in Escambia County, Florida?

A. I think so.

Q. That is this county here, Century above Pensacola?

A. Yes, sir.

Q. All right, now, when you moved to Century, did your father have any intercourse with you there?

A. Yes, sir.

[fol. 34] Q. Now, about how often did he do it with you there?

A. Once or twice every week, but when my period would come on, I would tell him I couldn't, and then he wouldn't

do it, but about the time I got pregnant, well, I had not quite finished my period and he messed with me then and that is when I got pregnant.

Q. Now, when was this?

A. It was when Mother had went to make arrangements for my little sister's casket.

Q. You had a little sister die?

A. Yes.

Q. What was her name?

A. Anne Elizabeth.

Q. Was it Christmas in 1956 that they moved to Century, Florida, about Christmas, in December of 1956?

A. It was either '56 or '55. I don't really remember.

Q. Were you pregnant when you moved to Century?

A. No, sir.

Q. When was the baby born?

A. April the 1st, 1958.

Q. April, 1958?

A. Yes.

Q. Do you know about when you got pregnant?

A. On June the 29th.

[fol. 35] Q. What year was that, Carol Jean?

A. That was in '56, I believe.

Q. '57?

A. It was a little while before we were sent to the home.

Q. Was that in the year '57 or '56?

A. That was '57, July the 18th.

Q. In other words, you got pregnant the summer of 1957?

A. Yes, sir.

Q. Were you living in Century, Florida, at that time?

A. Yes, sir. Miss Holmes, I had not started, and she took me to the doctor. First she took me to Dr. Hixon, and he thought that I was just upset over being took to the home, and then she took me back a week later to another doctor, and I was three months.

Q. Now, while you were living up in Century did you ever consent to your father having intercourse with you?

A. No, sir.

Q. What did you say to him?

A. I said, "Daddy, don't."

Q. And what did he say?

A. He said, "Hush," that he would do it anyhow, even if I didn't want him to. I never consented

Q. Did he ever threaten you?

A. Yes, sir.

[fol. 36] Q. How did he threaten you?

A. Well, he told me he would kill me. I can remember the first time—the first time Mother knew about it, see, he would take me and tell Mother—we had a wood stove—that me and him was going to get wood, and he would take me off down in the woods and have intercourse with me and he would say if I told Mother that he would kill me.

Q. Did your mother even know that you were having intercourse with your father?

A. No, not while, you know, when I was very young. She knew it the first time, but, see, he would take me off somewhere.

Q. Didn't you all ever have it inside of the house?

A. Yes, but that was when I got maybe a couple of years more older.

Q. Now, you say that your mother had gone to make arrangements for your sister's casket, and that was the last time you had intercourse with your father?

A. Yes, sir.

Q. Do you remember about when your sister died.

A. It was in July because I believe it was a couple of weeks after she had been buried. Well, the neighbors had us sent to the home.

Q. Let's go back now. You say in July, about the first part of July?

[fol. 37] A. Yes, sir.

Q. Did you have any intercourse with you father during June of that year, 1957?

A. Yes.

Q. About how many times?

A. Maybe once or twice or maybe three times.

Q. Did your mother ever know anything about it?

A. Yes, sir.

Q. How do you know that she knew about it?

A. Well, she would say that she was tired and to "Go get Carol."

Q. You have heard her say that?

A. Yes, sir.

Q. What would your father do then?

A. He would either bring me in the bed with him or either go back into my bedroom.

Q. What did your mother tell you?

A. She said, "Oh, go on."

Q. What did she mean by that, do you know?

A. No, I don't.

Q. You have a pretty good idea?

A. Yes, sir, I guess she just didn't want Daddy to mess with her.

[fol. 38] Q. And on those occasions your mother told you to go on in to him?

A. Yes, sir.

Q. Was that in Century, Florida?

A. Yes, sir.

Q. Did you have relations with him after you got pregnant?

A. No, sir, I don't believe so. I believe we was sent to the home.

Q. When you moved to Century, did you live there continuously until you got pregnant?

A. Yes, sir.

Q. What is your age right now, Carol Jean?

A. Fourteen.

Q. When were you fourteen?

A. February the 28th.

Q. 1958? This past year?

A. Yes, sir.

Q. And when you became pregnant, you were thirteen years old, is that not correct?

A. Yes, sir.

Q. Now, did your father have relations with you from the time you got pregnant right on down to the time you were eleven years old?

[fol. 39] A. Yes, sir.

Q. Did you ever have relations with anybody else?

A. No, sir.

Q. Did you ever date or go out during this time?
A. No, sir.
Q. You never did?
A. No, sir.
Q. And how many times since you have lived in Escambia County up in Century did your mother actually tell you to go in there, or did you hear her say that she was tired, and "Go get Carol"? Just an estimate about how many times.
A. Well, four or five times.
Q. Four or five times? That is between December and June or July?
A. Yes, sir.
Q. And every time did your father have intercourse with you?
A. Yes, sir.
Q. And she knew about it?
A. Yes, sir.
Q. She didn't try to stop it?
A. She didn't, no, sir.
Q. Where is your father, Carol Jean? Is he in court today?
[fol. 40] A. Yes, sir.
Q. Would you point him out, please.
A. Right there. (Indicating defendant Willard Carnley)
Q. What is his name?
A. Willard Hubert Carnley.
Q. Would you point out your mother, please.
A. There. (Indicating defendant Pearl Carnley)
Q. What is her name?
A. Pearl Rhoda Carnley.
Q. Now, when did you have your baby?
A. April the 1st, 1958.
Q. Was it a boy or a girl?
A. It was a girl.
Q. And whre is the baby now?
A. It was adopted out.
Q. Where did you have the baby?
A. It was in a hospital in Tampa but I was in a Salvation Army Home during all the time I was pregnant.

Q. Did you during these times try to scream or resist your father?

A. No, I never tried to scream but I have argued with him.

Q. You have argued with him? What did you say and what did he say, now?

[fol. 41] A. Well, I don't remember.

Q. You don't remember, but you did try to argue with him?

A. Yes, sir.

Q. Why did you submit to him?

A. Well, he has threatened by brother and mother and even me, so I was scared of him, especially when he was drunk.

Q. How old were you when your father first got penetration, Carol Jean? I mean, he actually got inside of you. You said that he tried for a while and finally got inside of you.

A. I don't know. I must have been about twelve years old.

Q. You were about twelve? He tried for a year?

A. Yes, sir.

Q. Was he staying home during this time or was he working?

A. Well, he was home most of the time.

Q. He was not working?

A. No, sir. Maybe he would pick up a little job here and there.

Q. How were you all supported then?

A. By the welfare. We was getting a school check of $81.00.

Q. That was before you got pregnant?

A. Yes, sir.

Q. What kind of work did he do up in Century, if he did any at all, do you remember?

[fol. 42] A. He painted for Mr. Hudson. He painted some houses.

Q. What did he say when he found out you were pregnant?

A. I was in the home, and Mother, she had come down to try to get us out of the home when Mrs. Holmes had done took me to Judge Bruno, I think, and told—

Q. Well, don't say what she told him unless your mother was there.

A. No. She found out that I was pregnant when she had went down there to try to get us out of the home.

Q. And what did she say about it, if she said anything?

A. I was down with the Asiatic flu, and she come to see me, and Mrs. Holmes let her up in my room for about five minutes and she said, "Carol Jean, I know you are pregnant." I said, "Yes, Mother. You know who is the father of it, too."

Q. And what did she say?

A. She said, "Yes."

Q. Did you talk to your father about being pregnant?

A. No, sir.

Q. You didn't? Did he come to see you?

A. No, sir.

Q. He never did come to see you?

A. He come to see me maybe once or twice before he found out that I was even pregnant. After I was pregnant, he didn't come to see me.

[fol. 43] Q. What grade are you in school?

A. Seventh grade.

Q. Carol Jean, let me ask you this. What sort of threats did he make to your brother? You said that he threatened your mother and yourself.

A. That he would kill him, and he has shot at him and he has throwed knives.

Q. How about your mother? Has he thrown knives at her?

A. He had poked knives to her, maybe her stomach, and threatened her and hit her, and he would beat my mother a lots when he was drunk.

Q. But he did make some threats to you?

A. Yes, sir.

Q. Now, this penetration, when he actually got into you, did he get into you with his hands or with his private parts? Did he put his hand inside of you?

A. No, sir.

Q. It was his private parts inside of you?

A. Yes, sir.

Q. Did he ever use any sort of contraceptive, or do you know what a contraceptive is, a rubber or any sort of protection?

A. Sometimes.

Q. He did?

[fol. 44] A. Yes, sir, once he did.

Q. Where was this?

A. I can't remember, but we was—I know the name of the person's house we was renting.

Q. Who were they?

A. His last name was Mr. Skipper, I think.

Q. Was that here in Escambia County?

A. I don't—it has been so long, I don't know.

MR. CUMMINS: No further questions.

THE COURT: Mr. Carnley, did you wish to cross examine the witness? Do you wish to interrogate the witness concerning what she has testified to?

MR. WILLARD CARNLEY: Yes, sir.

CROSS EXAMINATION BY MR. WILLARD CARNLEY:

Q. Carol Jean, you say your mother, she went and made arrangements to get the casket for your sister?

A. Yes.

Q. You are right sure now that she did?

A. I am sure.

Q. Well, I will tell the Court, my wife was out at Mr. Joe Gayfer's house—

THE COURT: Wait a minute, sir, you are testifying. [fol. 45] You will have a chance to testify when the State rests. Any questions you wish to ask your daughter, you are welcome to do it.

CROSS EXAMINATION BY MRS. PEARL CARNLEY:

Q. Carol Jean, don't you recall after you got age of maturity that Mother tried to tell you right from wrong and always teach you right from wrong?

A. Yes, you have taught me right from wrong.

THEREUPON the witness was excused.

J. W. CARNLEY, a witness in behalf of the State, who after being first duly sworn testified as follows:

DIRECT EXAMINATION BY MR. CUMMINS:

Q. J. W., tell the Court and Jury your name, please.
A. My name is J. W. Carnley.
Q. And how old are you, son?
A. Fifteen.
Q. You are fifteen. What day were you fifteen?
A. December the 23rd.
Q. And in June and July of '57 you were fourteen years old, is that not correct?
A. Yes, sir.
Q. Do you go to school?
[fol. 46] A. Yes, sir.
Q. What grade are you in?
A. Tenth.
Q. Tenth where?
A. Escambia High.
Q. Escambia High School?
A. Yes, sir.
Q. James, is Pearl Carnley your mother?
A. Yes.
Q. And is Willard Carnley your father?
A. Yes, sir.
Q. Carol Jean Carnley is your sister?
A. Yes, sir.
Q. How many other brothers and sisters do you have?
A. Four, four living. I have two sisters and three brothers living.
Q. And do you have a dead sister?
A. Yes.
Q. What is her name?
A. Anne Elizabeth. I think that is it.
Q. When did she die?
A. She died July of '57. I forget the date she died.
Q. James, have you ever seen your father have sexual [fol.47] relations with your sister Carol Jean?
A. Yes, I have saw it.
Q. Where?

A. I saw him once at Allentown. I walked in the bedroom where they was at. He said, "Boy, you had better get out of here or I will get hold of you."

Q. Was this at night?

A. Yes.

Q. And where were you sleeping at the time?

A. I was sleeping in the room right down from them.

Q. Who was your sister sleeping with generally then, another sister or your father and mother?

A. No, sir, my sister generally slept with a little boy about, I guess he was about two or three years old, something like that.

Q. And how long have you lived in Escambia County, Florida?

A. I don't know, about a year and a half, I guess.

Q. Do you remember what date you moved to this county?

A. No, sir, I don't.

A. Where were you living when your sister died?

A. Century.

Q. That is in Escambia County, Florida?

A. Yes, sir.

Q. Do you remember, does that sort of tie in? Could [fol. 48] you now remember about when you moved to Escambia County?

A. I believe it was sometime in December, I think.

Q. December the year before, in other words, 1956?

A. I believe it was, the early part of December.

Q. Now, have you seen your father have intercourse with your sister since December of '56?

A. No, sir.

Q. Have you heard anything?

A. Yes, sir.

Q. What have you heard exactly, with reference—

A. I have heard him tell—I have heard my mother tell him that she was tired, or something like that, and she would say, "Get Carol," you know, and they would get her in there, and Carol would put up an argument about it.

Q. How many times did you see this happen, son, or hear it happen?

A. From December until July, I guess two or three times, I guess.

Q. You heard it two or three times?

A. Yes.

Q. Well, did it always seem to happen that way, your mother would say she was tired?

A. Yes.

[fol. 49] Q. What would your father say, to begin with? Would he say he was going to have sexual relations? How did he put it exactly?

A. Well, he would say, "What about," you know, "let's do that," you know, and she would say, "Well, I am tired. Get Carol."

Q. And would he go get Carol?

A. Yes, he would either go in the room with her or they would get her out.

Q. Who would get her out?

A. Mother or Daddy either one, they would say, "You had better get on out here."

Q. Did you ever say anything to your father about this?

A. I told him he was going to get in trouble about it.

Q. Did you tell him that?

A. Yes, sir.

Q. What did he say to you?

A. He said, "Shut up, I am going to get hold of you," something like that.

Q. Did he ever threaten you?

A. Yes, sir, he has threatened me. He has shot at me and he has throwed knives and chairs at me.

Q. He has shot at you?

A. Yes.

Q. With what?

[fol. 50] A. A rifle.

Q. Twenty-two?

A. Yes, sir.

Q. Now, he has thrown knives at you, too?

A. Yes, sir.

Q. Since you have been living up in Century?

A. Yes, in Century.

Q. About how many times?

A. Well, I don't remember.

Q. Did you ever see your father and mother fighting?

A. Yes.

Q. Did he ever throw a knife at her?

A. Well, I don't think he has ever throwed any at her. He has drawed them and things like that and said he would use it on her, you know.

Q. Now, was your father home most of the time since you moved to Century until June or July?

A. Yes, sir, he was home most of the time.

Q. Was he working?

A. No, sir.

Q. How were you all living then?

A. Well, they was, Daddy and Mother, they drew a welfare aid check or something, to send us to school with. That was what it was supposed to be for.

[fol. 51] Q. Did your sister run around with any other boys?

A. No, sir.

Q. Did she date?

A. No, sir.

Q. Was she a good girl?

A. Yes, sir.

Q. She never went out with any other boys at all then?

A. No, sir.

Q. How old is your sister now?

A. She is fourteen now.

Q. Do you know when she was fourteen?

A. Yes.

Q. When?

A. February 28th.

Q. February 28th of this year, 1958?

A. Yes, sir.

Q. Do you know if your sister ever became pregnant? Do you know if she had a baby?

A. Yes, when the welfare sent her to Tampa, she was.

Q. Did you ever talk to your mother and father about her being pregnant?

A. No.

[fol. 52] Q Did they talk to you about it or say anything to you?

A. No, sir, not as I recall.

Q. Now, when did you leave home? When did you leave Century?

A. To come up here in Pensacola and live?

Q. Yes.

A. About July the 18th, I believe.

Q. Why did you leave?

A. Because we were not being taken care of right or something like that, the best I remember.

Q. Who took custody of you?

A. I don't know, I guess it was the welfare did, and they sent me and my brother to Youth Harbor until they found us a home to stay at, and they sent the rest of the children to 12th Avenue.

Q. Where are you staying now?

A. Mrs. Spivey, 3900 West Moreno Street.

Q. Where is your sister staying?

A. Same place.

Q. Same place? Is Carol Jean the one you are talking about now?

A. Yes.

Q. Did your parents ever come to see you after you were taken into custody by the welfare office?

A. Yes, sir, they came to see me at Youth Harbor, I think, about two or three times.

[fol. 53] Q. Was there ever any talk about your sister being pregnant at this time?

A. No, sir.

Q. Nobody ever said anything to you about it?

A. Nobody ever said anything to me.

Q. James, let's get back to what happened up in Century. You said that after your mother said, "Go get Carol"—

A. Yes, sir.

Q. Did you hear what would transpire after that?

A. Well, they would, after they got Carol into the room, she wouldn't want to submit to him, but he would force his way on her.

Q. What would they say?

A. She would say, "You had better quit or I will tell on you," or "Call the police," or something like that, and he would say, "You had better not or I will—", just threatening her.

Q. Now, did he always take her into his room or did he sometimes go into her room?

A. He sometimes went in her room.

Q. But you could hear all of this?

A. Yes, sir.

Q. Now, how close were you to these two rooms?

A. Well, I was right beside Carol's room, and his wall connected to my wall and I could hear through the walls. [fol. 54] Q. How do you mean his wall connected to your wall?

A. Well, it was kind of partitioned off. Here is one room here and one room here and one kind of in the back. (Indicating)

Q. They were adjoining rooms?

A. Yes, sir, and there was no door. I could hear right on there.

Q. There weren't any doors?

A. No, not on the inside of the house, there were no doors.

MR. CUMMINS: No further questions.

THE COURT: Mr. Carnley, do you wish to cross examine the witness?

MR. CARNLEY: No, sir.

THE COURT: Mrs. Carnley?

MRS. CARNLEY: Yes, sir, I sure do.

CROSS EXAMINATION BY MRS. CARNLEY:

Q. J. W., at this period of time, did you realize whenever we was up there at Century of your Dad's sickness from the time we moved up there until it was springtime, and after he was sick from his stomach that he taken a serious attack down by reason of his employment?

A. Yes, I realize he said he was sick. He was supposed to be sick. I know that.

THEREUPON the witness was excused.

[fol. 55] MR. CUMMINS: THE STATE RESTS, YOUR HONOR.

THE COURT: Mr. Carnley, the State has rested their case. You reserved the right to make an opening statement to the jury as to what you intend to prove in your

own defense. You can exercise that right now and make a statement to the Jury.

THEREUPON the defendant Willard Carnley made his opening statement to the Jury.

THE COURT: Mrs. Carnley, do you wish to make an opening statement?

THEREUPON the defendant Pearl Carnley made her opening statement to the Jury.

THE COURT: The two of you have made your opening statements to the Jury. Now, before you take the witness stand, if you wish to testify, it is the duty of the Court to advise you that under the Constitution you can't be required to testify against yourselves. You can testify in your own defense, if you like, but anything you testify to can be held against you. Mr. Carnley, would you like to take the witness stand?

MR. CARNLEY: I would love to say one more thing.

THE COURT: Wait a minute, sir. Do you wish to take the witness stand and testify?

MR. CARNLEY: Yes, sir.

[fol. 56] WILLARD CARNLEY, a witness in his own behalf, who after being first duly sworn testified as follows:

THE COURT: Face the Jury, sir, and testify. You are free to testify now, Mr. Carnley.

MR. CARNLEY: Well, what I had now, the children, they was talking about that I didn't come to see them. I come to see them as many times as I could while they was out there. I went out there, and Glenn, he was sick and was crying, and I was hurt over them taking my children and I got mad there at that woman and kind of popped off a little bit, so she called Judge Bruno, and Judge Bruno told her to not let me come out there to see the children no more. Well, then I taken and told my wife I couldn't live in a country where I couldn't see my children. I went to work at a milk dairy and every other week I would give ten dollars to a fellow to bring my wife over here to see the young ones. She could see them, but they wouldn't let me see them. Well, I was only making twenty-five dollars a week. Of course, we was getting all

out milk. I would just take milk from the milk dairy and everything, and this here about the girl, I ain't never handled my daughter in no disorderly respect, and they played hookey a lots from school. When they was going to school, we would send them and they wouldn't go. They didn't have to ride the bus with the other young ones because they went to one school and they went to the other and they played hookey. We sent them to school and we thought they had went and they hadn't. And [fol. 57] during the time that my wife says she seen her last period, well, there was a family of folks lived down the road from there. His wife was sick and they had a little baby, too, and my wife let the daughter go down there every morning early and cook for them and wait on them for about two weeks or maybe approximately a little longer. When she come back home, she would grab a magazine or something or other and read until about dark and she was getting ready then to go and watch television, that's all that she did, television, and we let her go. Sometimes she would go one way and sometimes she would go the other way to watch television and sometimes she would come back at nine o'clock or eleven or eleven-thirty, and I told my wife I believed we were letting her go a little too much, and she said, "No, they are getting old enough to have a little bit of privilege," and so I didn't think nothing else about it, and as far as me knowing anything about it, I didn't know until my wife come back and told me about it. We was working, trying to get straightened out, trying to get a lawyer to get my children back, and that is all I have to say.

CROSS EXAMINATION BY MR. CUMMINS:

Q. Have you ever been convicted of a crime, Mr. Carnley?

A. Yes, sir.

Q. How many times?

A. One time.

Q. One time? How was your house in Century ar- [fol. 58] ranged? You mentioned the houses were this way and that way.

A. Well, you come in the front door here, me and my wife, out bed was in the front room, and there was another room here. (Indicating) The door went through here, and then there was another room back in here. The door went back in there. That was the only outlet from in there on and around through our room.

Q. There weren't any doors, were there?

A. Sir?

Q. It was a sort of shotgun house?

A. Yes, sir, it was a square house but the rooms cut off—our bedroom was here and the kitchen was right back of it, and the rooms run kind of just about like this here, and you go out our room into her room and her rom into the boys' room, and me and my wife, we had our bed in the front room, and the kitchen then was just beyond there.

Q. There weren't any doors in the house, were there?

A. No, sir, no doors.

Q. Now, did you ever hear that your daughter was pregnant?

A. Sir?

Q. Did you ever hear that your daughter was pregnant?

A. Not until my wife come back and told me.

Q. Had you been to see your daughter before then?

A. Yes, sir, I went up until they stopped me.

[fol. 59] Q. That was after you found out she was pregnant?

A. No, sir.

Q. You saw her after you found out she was pregnant?

A. No, sir, I had never seen her until we went to Pensacola, because they wouldn't let me.

Q. Who made arrangements for this shroud for your baby who died?

A. I did.

Q. You did? Your wife never did make one arrangement at all?

A. No, sir. You can call up Mr. Waters over there. I was the one that came got the casket, and I got it on credit and I have been messed up so I haven't paid for it yet.

Q. In other words, when you testified at the preliminary

hearing, you were asked, "In other words, your wife never had anything to do with those arrangements," and you answered, "No, sir, my wife wasn't even down there"?

A. No, sir, she wasn't even down there.

Q. Did you ever threaten your son with a knife?

A. No, sir.

Q. Did you ever threaten him with a gun?

A. No, sir.

Q. Do you own a gun?

A. No, sir.

[fol. 60] Q. You never have had one in your house?

A. Yes, sir, I used to have one a long time ago but I got down sick and was operated on and I had to sell it.

Q. I am talking about here, when you were up at Century. You never have had one in your house?

A. No, sir. I don't even tote a pocket knife, not since I cut Walker Yarborough and got sent off for it.

Q. You are not the father then of your granddaughter?

A. No, sir.

Q. You used a contraceptive then, is that right?

A. Sir?

Q. You used a contraceptive, a rubber?

A. No, sir, I ain't never messed with her.

Q. When did your daughter Anne Elizabeth die?

A. I don't just remember when she died, but we were living over there on Mr. Alonzo Ellis' place.

Q. About when was it? Were you living in Century then?

A. Yes, sir, the baby, we was living up there at Century in Mr. Hudson's house.

Q. Was it in 1957, last year?

A. Yes, sir.

Q. In the summer of last year?

A. Yes, sir.

[fol. 61] Q. Weren't you living on welfare support then?

A. Sir?

Q. Were you living on welfare then?

A. Yes, sir, and I was picking up painting to do, little jobs that I could get to do. Mr. Hudson, he was building some houses, and every time he got one ready to paint, well, I painted it for him.

Q. Did you say that your son always had money?

A. Yes, sir.

Q. And you say you didn't know how he got the money?

A. Well, I know how he got some, because I whipped him and made him carry it back to him.

Q. Let me ask you this. Did you not testify this way at the preliminary hearing: "Did they have a hearing on this case? No, sir," and further down, this is on page 28, "They had money. They sold peanuts. I helped them sell peanuts and I give them money. They had money to spend all the time." In other words, they made their money selling peanuts, didn't they?

A. Well, they had some but he had more than that to spend when he went to selling peanuts, because J. W. hardly ever did sell any peanuts.

Q. But he did sell peanuts?

A. Once in a while.

Q. Well, which is right?

[fol. 62] A. The two other boys is the ones that sold the peanuts every day, me and them.

Q. You and them?

A. Yes, sir.

Q. You made money selling peanuts, too?

A. Yes, sir.

Q. Is J. W. your son?

A. Yes, sir.

Q. Is Carol Jean your daughter?

A. Yes, sir.

Q. How old is Carol Jean?

A. She is fourteen.

Q. How old was she in June of 1957?

A. She was thirteen.

Q. How many other children do you have?

A. I have got six.

MR. CUMMINS: That is all.

THE COURT: Mrs. Carnley, do you wish to cross examine the witness?

MRS. CARNLEY: Yes, sir, I sure do. In one statement that he made he just kind of forgot a little bit.

THE COURT: Well, don't start testifying. We will give you an opportunity. Do you wish to cross examine Mr. Carnley?

[fol. 63] MRS. CARNLEY: No, sir, I don't wish to cross examine him.

THEREUPON the witness was excused.

THE COURT: Mrs. Carnley, the Court advises you that under our Constitution you can't be required to testify and that anything you testify to can be held against you. Do you wish to testify?

MRS. CARNLEY: Yes, sir, I surely do.

PEARL CARNLEY, a witness in her own behalf, who after being first duly sworn testified as follows:

THE COURT: You may proceed, Mrs. Carnley.

MRS. CARNLEY: Well, this incident what that we are talking of, well, during the time that they are speaking of our Anne Elizabeth, just as my husband said, I was at my cousin's at the time that he went to make the arrangements and all that I done was got my cousin to carry us back home and also bring the baby. And during these times that my daughter was talking of her Daddy's mistreatment toward her, that is certainly not so, because I was around the house quite a bit myself and also I never seen her Daddy in no respects disrespectfully in no way, shape or form because for one thing, if there was any correcting or chastising to do, it was always left [fol. 64] up to me because he always said the mothers knew better how to correct the daughters than the fathers, so that was mostly left up to me. And as far as my husband ever threatening the kids, he never threatened the kids with nothing at all and also me and him, we used to argue, but as far as him threatening me, he never did, but you know arguments always come in all married families. Arguments always comes in some way, but so far as us arguing with the children, we never did argue with the children. We tried to be firm with them, but it seemed like the more firm we got, these two older kids, they couldn't stand the pressure, so they would, every time that their Daddy would get after them or something or other about some of their doings, well, that oldest boy would say, "Well, Daddy, you will sure regret it. I will get even with you one way or the other," and also the girl would get mad and flirtified and she would almost have the same opinion. Of course, she wouldn't say so

but she would have almost the same opinion about things. And so far as the first of her pregnancy was whenever she come down here, I came down here to make arrangements to try to get the kids and I came to see the girl several times, well, once or twice or three times more, and she never even mentioned a thing to me about her being pregnant up to the last time, and that was after I seen Judge Bruno, and I said, "Honey, I sure hate it for you," and that was all that was ever mentioned. The other times she never did mention anything about the pregnancy during the whole time that I would go to see her. She never did mention it, and that is all I have [fol. 65] got to say.

CROSS EXAMINATION BY MR. CUMMINS:

Q. Mrs. Carnley, the night that your husband made the arrangements for the shroud and casket for your daughter, the one that died, Anne Elizabeth, now, did he make all those arrangements?

A. Yes, sir, he surely did.

Q. And you didn't go in at all and help him?

A. No, sir, I didn't. I was at my cousin's.

Q. You didn't stay there at all?

A. No, sir.

Q. Do you remember testifying before Judge Page on this same thing?

A. Yes, sir, I sure do.

Q. You knew you were under oath then, ma'am?

A. Yes, sir, I knew I was under oath.

Q. Do you remember these questions and your answers to them: "Question, Well, who did you make the arrangements with in regard to the casket and so forth. Was it here in Pensacola?"

A: Yes, sir, it was here in Pensacola. It was Waters and Hibbert.

Q. "And you made the arrangements yourself"? Your answer, "Well, yes, my husband and I both made the arrangements, he and I both did, but, see, I came first and he came later." In other words, you did come in [fol. 66] first, didn't you?

A. Now, listen, what that I want to explain to you, I came to my cousin's first and then I come on down to

the hospital and I found out, they told me about my baby's death. So they called Waters & Hibbert and they came over there and got the baby's body, and I answered the questions that they asked me. Well, I left from there and went on back out there to my cousin's. I stayed out there until my cousin come in, and after he come in, well, I got him to carry the oldest boy and myself downtown to meet my husband to go to the undertaker and get the baby and bring it on back out to the house, and he done the dress buying and everything at Sears and Roebuck. So that is where I say that he and I both were, we both made some of the arrangements, you see, but as far as the business part, well, he done more of that than I did. The only thing I done was go to the hospital, and they made arrangements for Waters & Hibbert to take the baby from there on to the undertaker, and I answered what questions that they asked me then.

Q. Well, that is the same questions that I am asking you right now, and I ask you what your answers are. "Well, who did you make the arrangements with in regard to the casket and so forth? Was it here in Pensacola," and you said, "Yes, Waters and Hibbert," and "Did you make the arrangements yourself?" "Yes, my husband and I both make the arrangements, he and I both did. I came first, and he came later." Now, isn't it a fact that when Anne Elizabeth died that your husband [fol. 67] sent you and J. W. to hitch hike in to make the arrangements?

A. Well, no, he didn't particularly send us to hitch hike.

Q. But you all did go in there that way?

A. Yes, sir. Listen, what I want to tell you, he didn't send us to hitch hike. We tried to make arrangements to catch a ride down there and we done everything we could and we couldn't get nobody to carry us, so we caught a ride as far as my cousin's and then we went straight from my cousin's on to the hospital.

Q. Did you ever have any fights with your husband?

A. Well, sir, no, sir, not to amount to nothing we didn't.

Q. Did he ever throw a knife at you?

A. No, sir. That is something he ain't done in the whole seventeen, nearly eighteen years, is throw a knife.

Q. Did he ever threaten your son J. W.?

A. No, sir, he never did threaten him.

Q. Did he ever have a gun in his house at Century?

A. No, sir, not when we moved to Century, surely he never.

Q. He never did threaten him with a gun?

A. No, sir, not when we lived in Century. No, sir, he didn't even have one.

Q. Didn't he say, "If you don't go on, boy, I will get a rifle and shoot you," up in Century?

A. No, sir, not up in Century, no, sir.

[fol. 68] Q. Do you remember over at the preliminary hearing when you were asked the following question: "Was this shooting that took place that J. W. testified to, was that over Carol Anne or was it over something different," and your answer, "No, it wasn't in particular over Carol Anne. He just got a little influenced off of that stuff, and to tell you the truth, he got mad at all of us, and J. W. somehow or other, he had a few remarks to make his Daddy some way or another. I don't know just how it all come up, and he had a few remarks to make to his Daddy, and his Daddy was real mad then and he said, "If you don't go on, boy," said "I will get my rifle and I will shoot you. Well, J. W., somehow or another kept on arguing with his Daddy, so his Daddy rose up and he taken and he got the rifle, and the little boy thought he was going to kill him, and he wouldn't have done it for nothing. He was just doing that just to be doing it because he was influenced at the time." You remember that testimony?

A. Yes, sir, but now let me explain a little question to you. He didn't do—what we are talking of, he didn't do that while we lived at Century.

Q. Well, you denied having the gun. You said he never had the gun and he never has threatened anybody, and I am saying that one of these statements you are making under oath, you are under oath now and you were under oath then, and one of them is incorrect, and I would like to find out which is the truth. Were you telling the truth

[fol. 69] then or are you telling the truth now? That is what it amounts to.

A. Well, it just amounts that he never did threaten the boy like the boy testified he did.

Q. But he did say, "If you don't go on, boy, I will get my rifle and I will shoot you," didn't he?

A. No, sir.

Q. He didn't say that? That is what you testified, isn't it?

A. No, sir, that is a misunderstanding there, no.

Q. Can you read?

A. Yes, sir, I can read.

Q. All right, is that your name? (Indicating)

A. Yes, sir, it is, Pearl Carnley.

Q. "A witness in her own behalf, who after being first duly sworn testified as follows;" Now, you just read from right there down to the bottom and see if you said it or not. Do you deny making that statement now, ma'am?

A. Well, now, what that I want to get you straightened out on that—

MR. CUMMINS: Your Honor, I don't want to press her, but I wish she would answer "Yes" or "No."

THE COURT: Mrs. Carnley, just answer the question "Yes" or "No."

Q. Did you make that statement over there?

A. Yes, sir.

MR. CUMMINS: That is all. We have no further questions.

THE COURT: Mr. Carnley, do you have any questions [fol. 70] to propound to your wife?

MR. CARNLEY: No.

THE COURT: Do you have any further testimony you would like to give, Mrs. Carnley?

MRS. CARNLEY: No, sir, not that I know of.

THEREUPON the witness was excused.

THE COURT: Mr. Carnley, do you have any further evidence you would like to present in your defense?

MR. CARNLEY: No, sir, not that I know of. I didn't have no gun up there at Century.

THE COURT: If you want to testify, sir, come up and take the witness stand.

WILLARD CARNLEY, a witness in his own behalf, was recalled to the witness stand and further testified as follows:

MR. CARNLEY: Well, I am talking about I didn't have no gun up there at Century. What she got mixed up on that is that I had a gun, used to, when I lived over there at Alonzo Ellis'. It is all true enough, I had a .22 rifle, but that was the time they was wanting me to shoot some birds out there, and I didn't have but a few cartridges and I wanted to go squirrel hunting and they kept on and made me mad, and I said, "Well, I will get out there and shoot the birds," but I said "When I shoot one, they will all fly away." He said, "Well, we will get down yonder around that pond and scare them and they will come back here and light in these trees," and I said, "All right." So I got down there and shot and killed three or four birds and directly one lit on a little old [fol. 71] little old limb, and I shot and hit the tree and glanced off and hit another one pretty close to him, and he claimed that I was shooting at him, and Christ in heaven knows I wasn't, because you stick something up there with a .22 rifle, and I ain't going to miss it. They can try me on that, but as far as me ever shooting at my young ones, I did not, and the time I was talking about the baby's death, my wife, they called up. The baby wasn't dead yet; it was in a dying condition. I told my wife, "I will try to get you a way down there," and I tried to get the money, and they come on walking, and I couldn't get no money, and they hadn't got to town before I had done got another call that the baby was dead, and the daughter come down there to the store with me to get some groceries down there, and when she got back, she told me the baby was done dead. Well, I pulled out and caught me a ride on downtown. The wife got to the hospital and answered the questions and she went out back to her cousin's. Well, I come there to the undertaking parlor to find out about it. So I made the arrangements for the casket and told him I would have to pay him as I could and I got the shroud on credit and I told them I would pay them for that, and then I called up my wife and told her that I had done had the

casket and a shroud and everything, to get her cousin to come down and pick it up and carry it home where I couldn't have that ambulance fee, because they wanted the money for that then, and I didn't have it. That is all I can say.

CROSS EXAMINATION BY MR. CUMMINS:

Q. I just want to ask you, you said you did accidentally shoot at your boy?

[fol. 72] A. No, sir, that was over in Santa Rosa County.

Q. No, sir, you stated that you were shooting at birds and he thought you were shooting at him, is that right?

A. The bullet glanced and hit a tree next to him, and he said I must have been shooting at him. That wasn't at Century. I didn't have a gun up there.

Q. Did you hear your wife say you made this statement before the judge, "If you don't go on, boy, I will get my rifle and shoot you"?

A. No, sir, I don't remember.

Q. In other words, your wife was wrong? You didn't make that kind of statement?

A. Sir?

Q. You didn't make a statement like that?

A. No, sir, I didn't.

Q. Didn't you send J. W. and your wife into town hitch hiking from Century?

A. Yes, sir. I couldn't get nobody to bring them. And they called up and my baby was done dead, and I got out and hitch hiked me a ride to town and made arrangements for the casket and got the shroud and found out where my wife was then, and she was back out at her cousin's, and I called her up and got Mr. Hillman, one of her cousins, to come in from work, to get him to come down to pick up the casket and the baby and all of us and carry us back home.

Q. In other words, they hitched hiked to town. Was Carol Jean there when they hitch hiked to town?

A. Yes, sir.

[fol. 73] Q. You were there with her?

A. Yes, sir.

Q. What time of day or night was it?

A. It was about ten o'clock one morning. Me and Hubert and William and Glenn and Dianne was all there at the house, a family of folks that lived right in front of the house, just room for a road to go through, and another family, they lived this side of us, and another along this side here, just like these houses here in town.

Q. In other words, you didn't go down and make arrangements yourself like you first testified to? Both you and your wife went down?

A. Yes, sir, I made the arrangements for the casket myself. I signed for it. I am the one that asked him about getting it on time.

Q. And this wouldn't be right, either what you testified at the preliminary hearing? "In other words, your wife has never had anything to do with those arrangements?" and your answer was, "No, sir, my wife wasn't even down there." That is wrong?

A. Not putting the baby away, she didn't. What I got mixed up in was getting the casket.

MR. CUMMINS: I have no further questions.

THE COURT: Mrs. Carnley, do you wish to cross examine the witness?

MRS. CARNLEY: No, sir.

THEREUPON the witness was excused.

THE COURT: Mr. Carnley, do you have anything [fol. 74] further to present in your own defense?

MR. CARNLEY: No, sir, I haven't.

THE COURT: How about you, Mrs. Carnley?

MRS. CARNLEY: No sir, not that I know of, owing to what that I just testified to, well, that is just exactly the way the thing went.

THE COURT: Let the record show both defendants have rested their case.

J. W. CARNLEY, a witness in behalf of the State, was recalled to the witness stand and further testified as follows:

DIRECT EXAMINATION BY MR. CUMMINS:

Q. You are the same James Carnley who testified here earlier, aren't you?

A. Yes, sir.

Q. James, let me ask you something. Did your father ever take a shot at you?

A. Yes, sir.

Q. With what?

A. A rifle.

Q. .22?

A. Yes, sir.

Q. Where did it take place?

A. Chumuckla.

Q. What exactly happened there, son?

A. Well, I think him and Mama was quarrelling over [fol. 75] something, and I said something about it or something, you know, and he said, "Boy, I will learn you," or something like that, and "Boy, I will kill you for running from me."

Q. You started running?

A. Yes, sir, I ran across the woods, and he shot at me.

Q. He wasn't shooting at birds?

A. No, sir.

MR. CUMMINS. No further questions.

THE COURT: Mr. Carnley, do you wish to examine the witness? Let me advise you this, Mr. Carnley. Your cross examination is limited to what he has just testified about. In other words, you can't go into any other evidence other than the shooting incident.

MR. CARNLEY: No, sir.

THE COURT: Mrs. Carnley, do you wish to cross examine your son?

MRS. CARNLEY: No, sir.

THEREUPON the witness was excused.

MR. CUMMINS: THE STATE RESTS:

THE COURT: Mr. and Mrs. Carnley, in this case each of you have testified and have not presented any evidence other than your own testimony as witnesses. This entitles you to both the opening and closing arguments. That is, each of you have the opportunity to get up and argue your case, and then the State argues its case, and

then you have the opportunity to get up and argue the rebuttal to what the State argues about. You may proceed with the argument.

[fol. 76] THEREUPON argument was presented before the Jury by the State and by the defendants.

COURT'S CHARGE

THE COURT: Gentlemen of the Jury, the defendants, Willard Carnley and Pearl Carnley, are on trial before you under an information which charges Willard Carnley on the 10th day of July, 1957, under the first count, with the offense of incest. Under the second count the defendant Willard Carnley is charged with the offense of fondling. Under the third count of the information the defendant Pearl Carnley is charged with being an accessory before the fact to incest, and also the defendant Pearl Carnley under the fourth count is charged with being an accessory before the fact to the crime of fondling.

Before the defendants, or either of them, may be found guilty of any offense under this information, it is first necessary that the evidence establish that the offense, if any, was committed and that it was committed in Escambia County, Florida, and that it was committed sometime within two years prior to the date of the filing of the information, the information having been filed on August the 11th, 1958.

To the information each of the defendants has entered his and her plea that he and she are not guilty. The effect of the pleas of the defendants is to cast upon the State the burden of proving by the evidence and beyond a reasonable doubt the guilt of the defendants, or each of them, and each defendant is presumed to be innocent until his or her guilt is established, respectively, by the evidence and to the exclusion of every reasonable doubt.

A reasonable doubt is one of conformable to reason, a doubt which a reasonable man would entertain, and it [fol. 77] does not mean a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible doubt. It is that state of the case which, after consideration of all the

evidence, leave the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. A reasonable doubt is not a mere shadowy, flimsy doubt amounting to the bare possibility that the defendants may be innocent, but it is a doubt which a reasonable and intelligent man would have after a full and fair comparison and consideration of all the evidence. If, after a full and fair comparison and consideration of all the evidence, the jury as intelligent and reasonable men have an abiding conviction to a moral certainty that the charge against either defendant is true, then they have a reasonable doubt, and it would be their duty to render a verdict of conviction of the respective defendant or defendants, as the case might be, as charged in the information.

The first count in the information charges that the defendant Willard Carnley on July 10th, 1957, being then and there the father of Carol Jean Carnley, and within the degree of consanguinity within which marriages are declared by law to be incestuous and void and then and there knowing the said Carol Jean Carnley to be his daughter, did then and there unlawfully, feloniously and incestuously have sexual intercourse with the said Carol Jean Carnley against the form of the statute in such case made and provided and against the peace and dignity of the State of Florida. Under the law of Florida a man may not marry anyone to whom he is related by lineal consanguinity nor his sisters nor his aunt nor his niece, and it is a crime against the law of the state for any person so related within the degree of consanguinity with-
[fol. 78] in which such marriages are prohibited to commit adultry or fornication with any such person or to have sexual relations with any such person. By consanguinity is meant blood relationship. That is to say, it is the connection or relation of persons descended from the stock or common ancestor, as distinguished from affinity or relationship by marriage. Lineal consanguinity is that relationship which exists between persons of whom one is descended in a direct line from the other, as between the son and the father or the daughter and the father or the granddaughter and the grandfather. If you

find from the evidence in this case beyond a reasonable doubt that the defendant Willard Carnley did at divers times within two years prior to the filing of the information in this case have carnal intercourse with Carol Jean Carnley and that the defendant was the father of the said Carol Jean Carnley as alleged in the information, then you should find the defendant guilty as charged in the information.

The Court charges you that one separate and distinct act of sexual intercourse between father and daughter would constitute the crime of incest as charged in the information, provided the evidence establishes the same beyond a reasonable doubt.

Under the second count of the information the defendant Willard Carnley is charged with on the 10th day of July, 1957, at and in Escambia County, Flordia, did handle, fondle and make an assault upon Carol Jean Carnley, a female child then under the age of fourteen years in a lewd, lascivious and indecent manner without intent to commit rape upon said child by then and there placing his hands and private sexual parts upon and against the private sexual parts of said female child, against the form of the statute in such case made and [fol. 79] provided and against the peace and dignity of the State of Florida. The words "lewd and lascivious or indecent manner" connote the idea of lustful, or for the purpose of inciting lust, so if you find from the evidence in this case, beyond a reasonable doubt, that this man Willard Carnley did handle, fondle or assault Carol Jean Carnley in the manner and by the means charged in the information and that he did so in a lewd, lascivious and indecent manner, within the definition of those items as the Court has given them to you, it would be your duty to find the defendant guilty of fondling under the second count of the information. Of course, in that respect, with respect to the fondling count, the second count of the information, it also is necessary that the State establish its evidence beyond a reasonable doubt and that the evidence establish that the offense, if any, was committed and it was committed in Escambia County, Florida, sometime within two years prior to the date of the filing of the information, August the 11th, 1958.

The third count of the information charges the defendant Pearl Carnley with being an accessory before the fact to incest. That is to say, the third count charges that Willard Carnley on the 10th of July, 1957, at and in Escambia County, Florida, being then and there the father of Carol Jean Carnley, and within the degree of consanguinity within which marriages are declared by law to be incestuous and void, and then and there knowing that said Carol Jean Carnley to be his daughter, did then and there unlawfully, feloniously and incestuously have sexual intercourse with the said Carol Jean Carnley, and Pearl Carnley, late of the County of Escambia aforesaid, before the committing of the felony aforesaid, to wit, on July 10th, 1957, with force and arms and in Escambia [fol. 80] County aforesaid, did unlawfully and feloniously counsel, hire and other wise procure the said Willard Carnley to do and commit the same felony in the manner and form aforesaid against the form of the statute in such case made and provided and against the peace and dignity of the State of Florida.

Under the law of Florida an accessory before the fact is one who, though absent at the time of the commission of a felony, did nevertheless procure, counsel, command or abet another in the commission of such a felony. In the event you find that the defendant Pearl Carnley, beyond a reasonable doubt, sometime within two years prior to the date of the filing of the information and in Escambia County, Florida, did procure, counsel, command or abet Willard Carnley in the commission of the crime of incest and that you find that the defendant Willard Carnley did commit the crime of incest, beyond a reasonable doubt as the Court has previously charged you, then you should find the defendant Pearl Carnley guilty of being an accessory before the fact to incest as charged under the third count of the information.

The fourth count of the information charges that the defendant Pearl Carnley was an accessory before the fact to the offense of fondling. The fourth count, in effect, says this, that Willard Carnley on the 10th of July, 1957, at and in Escambia County, Florida, did handle, fondle and make an assault upon Carol Jean Carnley, a female child under the age of fourteen years, in a lewd, lascivious

and indecent manner without intent to commit rape upon said child by then and there placing his hands and private sexual parts against the private sexual parts of said female child; and Pearl Carnley, late of Escambia County [fol. 81] aforesaid, before the committing of the felony aforesaid, to wit, on July 10th, 1957, with force and arms and at and in the County of Escambia aforesaid, did unlawfully and feloniously counsel, hire and otherwise procure the said Willard Carnley to do and commit the said felony in the manner and form aforesaid.

Under the law of Florida it is unlawful for a person to procure, counsel, command or abet another to commit a felony, and should you find that the defendant Pearl Carnley in Escambia County, Florida, sometime within two years prior to the date of the filing of the information, and beyond a reasonable doubt, did procure, counsel, command or abet Willard Carnley to commit the felony charged in the second count, to wit, fondling, you should find then in that event the defendant Pearl Carnley guilty of the offense of accessory before the fact to fondling as charged under the fourth count of the information.

In the evidence in this case there has been evidence tending to prove that the defendant committed other acts similar to those constituting the offense charged against him and against her, also, now in the information, and it is admitted in evidence solely for that purpose, the purpose being of tending to illustrate or explain such acts against him in this case which the evidence may show that he committed, or of tending to show with what intent, motive or knowledge if any, the defendant may have committed such acts charged against him in this case which the evidence may show that he committed, or of tending to corroborate any testimony that may have been given in this case tending to prove that the defendant committed—the defendant or defendants committed the offense or offenses now charged against him or her, [fol. 82] and the evidence relating to such other acts may be considered by the Jury for such purposes only and not for the purpose of finding whether or not the defendant or defendants is or are guilty of such other acts than those constituting the offenses with which they are presently charged.

You are the sole judges of the evidence and of the weight of the evidence and of the credit to be given the witnesses who have testified before you. In weighing the evidence you should reconcile the evidence or testimony if you can. If you cannot reconcile it, then it within your province to say which witness or witnesses you deem worthy of credit and which you deem worthy of no credit or belief at all, and you should base your verdict upon what you find to be the testimony of the credible witnesses who have testified before you. In weighing the evidence and in determining the credibility of the witnesses, you should take into consideration the interest, if any, that the witness has in the outcome of the case, and this includes the defendants who themselves took the stand as witnesses, the relationship, if any, that the witness has to any party who is interested in the outcome of the case, the apparent fairness or want of fairness of the witness while testifying. In weighing the credibility of a witness you must also take into consideration the apparent fairness or want of fairness of the witness in tetifying,t he manner and demeanor of the witness upon the stand while testifying, the means of observation that the witness had as to the facts about which he or she testifies, the probability or lack of probability of the truth of the facts about which the witness testified, and you will also take into consideration all of the other evidence [fol. 83] in the case which you find to be credible evidence and which tends either to corroborate or contradict that particular witness's testimony. In weighing the evidence and in determining the credibility of a witness, you have and should use and apply the same common sense and general knowledge of men and affairs that you use in your everyday lives. In connection with the credit that you should give to the witnesses who have testified, the Court charges you that should you find that a witness or witnesses have wilfully testified falsely as to any material fact, then under such circumstances you would be justified in disregarding all of the testimony of that witness or witnesses, if, in your judgment, you do not believe their testimony to be true.

The Court further charges you that the fact that the defendants were arrested and that an information has been filed against them in this case should not be considered by you as evidence against either of them.

Now, upon a question propounded by the State to the defendant Willard Carnley he answered in the affirmative or he admitted that he had been convicted of a crime. The Court charges you that you are not to consider that fact as evidence of the defendant's guilt in this case and that the sole purpose of such testimony is to guide you in weighing the credit to be given to testimony offered by the defendant Willard Carnley, and for that purpose only.

The Court instructs you that should you find the defendants, Pearl Carnley and Willard Carnley, guilty as charged in the information, that is, under the first count Willard Carnley is charged with the offense of incest and under the second count he is also charged with the offense of fondling. Under the third count Pearl Carnley is [fol. 84] charged with being an accessory before the fact to incest, and under the fourth count with being an accessory before the fact to fondling. Should you find the defendants guilty as charged under all four counts, the form of your verdict would be, "We, the Jury, find the defendants, Pearl Carnley and Willard Carnley, guilty under the counts of the information as charged. So say we all." In the event you find both of the defendants not guilty under all four counts of the information as charged, the form of your verdict would be, "We, the Jury, find the defendants, Pearl Carnley and Willard Carnley, not guilty under the counts of the information as charged. So say we all." There are other combinations of verdicts which you may render. The Court has prepared form verdicts in which you may render appropriate verdicts by deleting the words "not guilty" or the word "guilty." In the event that you find the defendant Willard Carnley guilty under the first count, that is, the charge of incest, and not guilty under the second count, under the charge of fondling, the form of your verdict would be, "We, the Jury, find the defendant Willard Carnley guilty under the first count and not guilty under the second count as charged." In the event you find that the defendant Wil-

lard Carnley is not guilty under the first count and guilty under the second count, that portion of your verdict would be, "We, the Jury, find the defendant Willard Carnley not guilty under the first county and guilty under the second count as charged in the information," and in that same verdict you can find the defendant Pearl Carnley either guilty or not guilty under either count of the information, that is, either the third or the fourth count of the information, or you can find her guilty under [fol. 85] one and not guilty under the other by deleting either the word "guilty" or the words "not guilty" as it applies to the respective counts.

You will retire to the Jury Room, select one of your number as foreman, and return to the Court with a verdict executed by your foreman. You may take the case.

[fol. 86] REPORTER'S CERTIFICATE
(omitted in printing)

[fol. 87] IN THE
FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

[Title omitted]

RETURN TO RESPONDENT'S REPLY BRIEF ON WRIT OF HABEAS CORPUS

The petitioners, Willard Carnley and Pearl Carnley, hereby make reply to the respondent's brief on writ of habeas corpus, saying:

I

The trial record as furnished these petitioners clearly reflects that they were plunged into the middle of their trial without any chance of preparing a defense and without counsel.

II

The record is silent as to the petitioner's claim that they requested defense counsel and protested their inability to defend themselves, also their request for lie detector tests; in fact the first page of the record would appear to have purposely omitted these salient facts and abuse of discretion.

III

Further, the record shows that two proficient prosecutors were arrayed against these indigent and uneducated defendants.

[fol. 88] IV

Uncontroverted factual allegations of a habeas corpus must be accepted as true so long as they are not repudiated by the records of the trial Court and it cannot be said as a matter of law that they are insufficient to raise a jurisdictional or Constitutional question:

United States v. Shaugnessy, 206 F. 2d, 392:
Chessman v. Teets, 221 F. 2d, 276.

V

The respondent's contention that defendants "were able to defend themselves" dehors the record and poses a question of doubt as to the respondent's fidelity to the law as portrayed in the authorities cited in the original petition.

VI

Petitioners request the Court to closely scan the observations in:

Webb v. Baird, 6 Ind. 13, 18:
Betts v. Brady, 316, 218. 455, 462;

Viz: It is not to be thought of in a civilized community—for a moment—that any citized put in jeopardy of life or liberty, should be debarred of counsel because he was to poor to employ such aid; no Court could be respected or respect itself, to sit and hear such a trial.

VII

The entire record reflects the ignorance and total inability of the petitioners to examine witnesses or in any way defend themselves and elaborately portrays the issues involved in the petition.

VIII

The record offers no material evidence of guilt and reflects that no offer was made to find fact with a polygraph test or a blood test of the child to determine parenthood alleged to be the petitioner.

[fol. 89]

IX

WHEREFORE, The respondent failing to show cause why petitioners should be illegally imprisoned and fails to show true cause of detention, and failing in his argument to adhere to the issues involved or respond to the questions raised upon which habeas corpus was granted, petitioners pray that this Honorable Court decree that a permanent writ of habeas corpus accrue and issue an

order that they be released frin their illegal imprisonment.

Before me, an officer empowered to administer oaths, appeared WILLARD CARNLEY, a petitioner herein, who deposes and says that the facts related in this Petition are true and correct.

/s/ Willard Carnley
WILLARD CARNLEY, Petitioner

• • • •

[fol. 90]

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1960

Case No. 30,473

WILLARD CARNLEY, PEARL CARNLEY, PETITIONERS

vs.

H. G. COCHRAN, JR., Director, Division of Corrections, RESPONDENT

OPINION FILED SEPTEMBER 23, 1960

A case of original jurisdiction—Habeas Corpus

Willard Carnley and Pearl Carnley, in Proper Person, for Petitioners

Richard W. Ervin, Attorney General and B. Clarke Nichols, for Respondent

TERRELL, J.

On petition of Willard Carnley and Pearl Carnley, writ of habeas corpus was on June 16, 1960, issued from this court as to each petitioner and return thereto was filed by respondent.

The return shows that respondent holds Willard Carnley and Pearl Carnley pursuant to a commitment from the Court of Record for Escambia County, Florida, dated September 19, 1958. Said commitments are predicated on judgments and sentences by the Court of Record of Escambia County entered September 19, 1958. The said judgments and sentences resulted from Willard Carnley and Pearl Carnley having been tried and convicted by a jury on an information charging Willard Carnley with the crime of incest and fondling and Pearl Carnley as [fol. 91] being accessory before the fact to incest and accessory before the fact to fondling.

It is shown that petitioners waived a jury trial but the trial court refused to accept waiver of the jury which

he had a right to do under the law of this state. Jones vs. State, 155 Fla. 558, 20 So.2d 901 (1945). All the evidence at the trial was accordingly submitted to and passed on by the jury. Respondent denies that petitioners were totally unable to defend themselves. He denies that petitioners requested counsel to defend them. He denies that the trial court peremptorily ordered petitioners to sit down when they attempted to interrogate the witnesses against them.

Respondent affirmatively alleges that petitioners actively participated in the conduct of the trial with both interrogating the witnesses against them, both making opening statements to the jury and both making closing arguments to the jury. It is further shown that petitioners were carefully instructed by the trial court with regard to the rights guaranteed to them under the state and federal Constitutions and with respect to procedure governing the trial. A certified transcript of the testimony taken at the trial is attached to and made a part of the record in this proceeding. It proves each and every of the proceedings enumerated herein.

Petitioners contend that the crime of incest and the crime of fondling constitute a single offense. It will be observed, however, that in this case defendants were found guilty of all counts charged in the information, that they were sentenced to imprisonment in the state penitentiary for a term of six months to twenty years, and by the terms of said sentence given credit for the time they spent in the Escambia County jail since their initial arrest on November 5, 1957. The sentence imposed was within the maximum prescribed by law for the crimes with which petitioners were charged and found guilty. Inasmuch as § 801.02, Florida Statutes, provides that the crime of incest, fondling [lewd and lascivious behaviour] when said acts are committed with a person 14 years old [fol. 92] or under, shall be included under the provisions of Chapter 801, Florida Statutes, certainly no harm accrued to petitioners. Buchanan vs. State, Fla. App. 1959, 111 So.2d 51.

Section 801.03, Florida Statutes, provides that anyone convicted of an offense within the meaning of Chapter

801 may, in the discretion of the trial judge, be sentenced to a term not to exceed 25 years in the state prison. The trial court having adjudged petitioners guilty of all crimes charged in the information filed against them and having sentenced them to only one sentence within the legal maximum provided by law for each of such crimes would seem to have decided this issue in favor of petitioners.

The return to the writ of habeas corpus shows that respondent no longer has custody of Pearl Carnley, inasmuch as she has been placed on parole and is accordingly subject to the supervision of the Florida Parole Commission, but it is shown that notwithstanding Pearl Carnley is now a parolee and as such is not physically confined in prison in the custody of respondent, she is so restrained of her liberty that she can maintain habeas corpus in an effort to secure her discharge from supervision of the Florida Parole Commission. Sellers vs. Bridges, 153 Fla. 586, 15 So.2d 293 (1943). For this reason the Florida Parole Commission joins in this return in so far as it pertains to the petitioner Pearl Carnley.

The law of this state does not require the court to appoint counsel to represent indigent defendants except in cases where they are charged with a capital offense. Section 909.21, Florida Statutes. If the record shows that defendant did not have counsel or fails to show whether he did or did not have counsel, it will be presumed that defendant waived the benefit of counsel and elected to present his own defense, as he has the right to do under Section 11, Declaration of Rights, Florida Constitution.

The purpose of the writ of habeas corpus is to bring petitioner before the court in order that the legality of his detention may be inquired into. The evidence and [fol. 93] the record before us show conclusively that petitioners were illiterate but illiteracy does not always mean that the illiterate lacked intelligence about many of the commonplace things of life. I have known men who had to sign their name by cross mark but those same men could go to the bank and push that cross mark through

the cashier's window and get all the money on it they asked for without any other endorsement. The banker knew they were intelligent men of good moral character, respected their obligation and would meet it. There is no showing here that petitioners suffered in the slightest from lack of intelligence. It is the general practice in this state when trying one charged with felony to inquire of him when he is arraigned if he has or desires counsel. If he answers in the negative and expressed a desire to have counsel, the court will generally appoint one to represent him.

An examination of the evidence and the record in this proceeding shows that the trial judge instructed the jury and the petitioners thoroughly with reference to their constitutional rights; the evidence was ample to establish the charges against them and there is not the least showing that they were prejudiced in any respect at the trial. To grant a new trial would amount to nothing more than thrashing over old straw.

The writ is discharged and petitioners are remanded. THOMAS, C. J., HOBSON, ROBERTS and DREW, JJ., concur

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 95] SUPREME COURT OF THE UNITED STATES

No. 641 Misc., October Term, 1960

WILLARD CARNLEY, PETITIONER

vs.

H. G. COCHRAN, JR., Director of the Division of Corrections

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 19, 1961

ON CONSIDERATION of the motion for leave to file a petition for writ of habeas corpus herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, denied.

Treating the papers submitted as a petition for writ of certiorari, certiorari to the Supreme Court of the State of Florida is granted. The motion for leave to proceed in forma pauperis is granted and the case is transferred to the appellate docket as No. 1045.

June 19, 1961

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 902330 85

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 158

WILLARD CARNLEY,

Petitioner,

v.

H. G. COCHRAN, JR., DIRECTOR OF THE DIVISION OF CORRECTIONS, FLORIDA,

Respondent.

BRIEF FOR THE PETITIONER

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Winter Park, Florida
Attorney for Petitioner.

INDEX

SUBJECT INDEX

CITATIONS

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

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Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Florida Supreme Court (R. 73) is reported at 123 So. 2d 249 (Fla., 1960).

Jurisdiction

The judgment of the Florida Supreme Court was entered September 23, 1960. The "motion for leave to file a petition for writ of habeas corpus" and motion for leave to proceed *in forma pauperis* were filed December 22, 1960 (R. Front Cover) and certiorari was granted June 19, 1961 (R. 77). The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3).

Constitutional Provisions and Statutes Involved

United States Constitution,
Amendment XIV, Section 1

See Appendix

Section 801.02, Florida Statutes, 1959 See Appendix
Section 801.03 (1) (a) Florida Statutes, 1959 See Appendix
Section 801.03 (1) (b) Florida Statutes, 1959 See Appendix
Section 801.08, Florida Statutes, 1959 See Appendix
Section 801.10, Florida Statutes, 1959 See Appendix
Section 741.22, Florida Statutes, 1959 See Appendix
Section 800.04, Florida Statutes, 1959 See Appendix

Question Presented

Petitioner filed a petition for a writ of habeas corpus in the Court below. His petition alleged and the record reveals without contradiction that he was convicted and sentenced for serious criminal offenses without the aid of counsel, even though he was illiterate. The question presented is whether these allegations alone, or in any event when considered together with his other allegations, were sufficient to support a claim that he was deprived of his liberty in contravention of the guaranties of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Petitioner was convicted on September 19, 1958 in the Court of Record in and for Escambia County, Florida, on two counts, the first charging "incest" and the second charging "fondling" (R. 6). His sentence was imprisonment for a term of six months to twenty years (R. 7). Petitioner's wife, Pearl Carnley, was convicted in the same proceedings on two counts of being an accessory before the fact to

"incest" and "fondling", and she received a like sentence (R. 7).

Petitioner commenced this action by filing a petition for a writ of habeas corpus in the Supreme Court of Florida (R. 1). His wife joined in the petition, but she is not a party to the proceedings before this Court (R. 77).

The petition for a writ of habeas corpus alleged that petitioner and his wife were arrested November 5, 1957, held until September 8, 1958, when they waived jury trial on the charges against them, but were nonetheless tried and convicted by a jury on September 19, 1958 (R. 1). It also alleged that petitioner "is completely without education and cannot recount the ABC's", and petitioner and his wife claimed: "Neither possesses the most elementary rudiments of criminal procedure or foreknowledge with which to conduct a defense" (R. 1). Among the other allegations contained in the petition was the following:

> "Petitioners requested defense counsel and protested their innocence and inability to conduct a defense, which same inability was outstandingly manifest at the farce of a trial when both petitioners tried to question the prosecutrix as to who conceived the idea of the criminal prosecution against them, whereupon the Court peremptorily ordered their victims to sit down".

It was also charged that petitioner was not advised of his right to arraignment without unnecessary delay, that he had no knowledge of any warrant or capias, nor was he presented with any nor was such a paper served or read to him at any time, that petitioner was held in solitary confinement for a period of five months prior to trial, that lie detector tests and blood tests to determine the parentage of a child allegedly born of the incestuous relationship were requested but refused, and that the prosecution waited until

after the birth of the child to fix the date upon which the alleged crime occurred.

On June 16, 1960 the Supreme Court of Florida issued a writ of habeas corpus directed to the respondent, the Director of the Division of Corrections (R. 11). Respondent filed a return to the writ of habeas corpus, stating that he held petitioner pursuant to a commitment predicated on a judgment and sentence entered by the Court of record in and for Escambia County, Florida, on September 19, 1958 (R. 12). The return admitted that petitioner was originally arrested on November 5, 1957, and held in Escambia County jail until his trial on September 19, 1958 (R. 13). The return also admitted that petitioner waived jury trial, but alleged that the trial court was not required to dispense with a jury, and that the evidence was submitted to a jury in this case (R. 14). The return denied that petitioner and his wife were totally unable to defend themselves in the trial, that they requested defense counsel, that the trial court peremptorily ordered petitioner to sit down when he and his wife attempted to interrogate the witness against them, and that petitioner requested a lie detector test and blood tests (R. 14). It was affirmatively alleged by respondent that petitioner and his wife actively participated in the conduct of the trial, with both interrogating witnesses against them, making opening statements and making closing arguments (R. 14 and 15). It was also alleged that petitioner was carefully instructed by the trial court with regard to the rights guaranteed by both the Constitutions of the State of Florida and of the United States (R. 15). The sentence imposed upon petitioner was defended on the ground that Section 801.03, Florida Statutes, authorizes a sentence not to exceed twenty-five years in the State Prison for any offense within the meaning of Chapter 801 (R. 15 and 16). A certified copy of a transcript of the testimony

taken at the trial was attached to respondent's return. All allegations not expressly admitted were denied (R. 16).

Petitioner thereafter filed a "Return to Respondent's Reply Brief" (R. 70) alleging that the trial record furnished by respondent clearly reflected that he and his wife were plunged into the middle of their trial without any chance of preparing a defense and without counsel, and noting that the record is silent as to petitioner's claim that he requested defense counsel and protested his inability to defend himself. It was further alleged that the record showed that two proficient prosecutors were arrayed against "these indigent and uneducated defendants" (R. 70).

The Florida Supreme Court in an opinion filed September 23, 1960, discharged the writ previously issued, and remanded petitioner to the custody of respondent. There is no showing that any opportunity was afforded petitioner to prove the allegations of his petition, the case being considered solely on the basis of the petition, return to respondent's reply brief, and the certified transcript of testimony attached to respondent's return. With respect to petitioner's argument that he was denied counsel contrary to the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution, the Florida Supreme Court said:

> "The law of this state does not require the court to appoint counsel to represent indigent defendants except in cases where they are charged with a capital offense. Section 909.21, Florida Statutes. If the record shows that defendant did not have counsel or fails to show whether he did or did not have counsel, it will be presumed that defendant waived the benefit of counsel and elected to present his own defense, as he has the right to do under Section 11, Declaration of Rights, Florida Constitution" (R. 75).

With respect to petitioner's allegation that he and his wife were illiterate and unable to defend themselves adequately, the Florida Supreme Court said:

> "The evidence and the record before us show conclusively that petitioners were illiterate but illiteracy does not always mean that the illiterate lacked intelligence about many of the commonplace things of life. I have known men who have had to sign their name by cross mark but those same men could go to the bank and push that cross mark through the cashier's window and get all the money on it they asked for without any other endorsement. The banker knew they were intelligent men of good moral character, respected their obligation, and would meet it. There is no showing here that petitioners suffered in the slightest from lack of intelligence" (R. 75 and 76).

Petitioner thereafter filed a motion for leave to file a petition for writ of habeas corpus in this court, and by order dated June 19, 1961, this court denied the motion. Treating the papers submitted as a petition for certiorari, this court granted certiorari and granted petitioner's motion for leave to proceed *in forma pauperis* (R. 77).

Summary of Argument

Petitioner's allegations in support of his application for a writ of habeas corpus, respondent's return, and the opinion of the court below render it clear that petitioner, though illiterate, was convicted and sentenced after a trial before a jury without assistance of counsel. Under the controlling precedents of this court these facts alone are sufficient to establish that his conviction must fall for failure of the proceedings against him to comply with the Constitutional

guarantee of Due Process of Law. This court has consistently recognized the difficulties facing an uneducated layman in defending himself against criminal charges, particularly when protesting innocence and confronted with the necessity for a full scale trial. An illiterate layman is not better equipped to defend himself.

Even if these circumstances alone be deemed insufficient, it is clear that when coupled with the prejudicial nature of the charges involved, the obvious ignorance and inability of petitioner to defend himself apparent from the transcript of testimony at his trial, and the complex legal questions potentially or implicitly involved, a sufficient claim was stated at least to require the court below to allow petitioner an opportunity to prove his allegations. With respect to the necessity for a hearing, however, petitioner believes that a sufficient factual basis is established by the record to provide grounds for his immediate discharge.

Petitioner also contends that in view of the now unqualified right to assistance of counsel provided for a defendant who can himself furnish such counsel, denial of such an unqualified right to a defendant who is too poor to furnish his own counsel constitutes a denial of due process of law and equal protection of the laws which can no longer be countenanced by this court. This question is squarely presented here in view of petitioner's allegations of his request for counsel and his indigence.

Since the circumstances of petitioner's conviction cannot be reconciled with the guarantees of the Fourteenth Amendment, the judgment of the Court below must be reversed.

ARGUMENT

I.

This Court Has Clearly Established That a State May Not, Consistent With the Fourteenth Amendment, Tolerate Criminal Procedures Which Result in the Denial in Any Particular Case of "Fundamental Fairness" to an Accused.

The basis for petitioner's claim that he is entitled to discharge from the custody of respondent lies in the Fourteenth Amendment to the United States Constitution. It is now established beyond question under the decisions of this court that a state may not, in the establishment of its law governing criminal prosecutions, tolerate procedures which in an individual case result in "a denial of fundamental fairness, shocking to the universal sense of justice". *Betts* v. *Brady*, 316 U.S. 455.

In the years since *Betts* v. *Brady*, this court has granted certiorari and considered a large number of cases from the state courts where allegations of fundamental unfairness arising primarily from the absence of counsel to represent the accused were involved. See for example, *Williams* v. *Kaiser*, 323 U.S. 471, *Tomkins* v. *Missouri*, 323 U.S. 485, *Rice* v. *Olson*, 324 U.S. 786, *Demeerleer* v. *Michigan*, 329 U.S. 663, *Bute* v. *Illinois*, 333 U.S. 640, *Wade* v. *Mayo*, 334 U.S. 672, *Townsend* v. *Burke*, 334 U.S. 736, *Uveges* v. *Pennsylvania*, 335 U.S. 437, *Gibbs* v. *Burke*, 337 U.S. 773, *Herman* v. *Claudy*, 350 U.S. 116, *Cash* v. *Culver*, 358 U.S. 633, *Hudson* v. *North Carolina*, 363 U.S. 697, *McNeal* v. *Culver*, 365 U.S. 109, *Reynolds* v. *Cochran*, 365 U.S. 525, *Palmer* v. *Ashe*, 342 U.S. 134. These cases make it clear that lack of counsel under particular circumstances may result in the denial to an accused of a fair opportunity to defend himself. And where the circumstances indicate that an ac-

cused may be seriously handicapped in presenting his own defense, these cases make it clear that it is incumbent upon the State to provide him with counsel to assist in his defense.*

Petitioner submits, in the light of the cases cited above that the uncontroverted allegations of his petition for a writ of habeas corpus clearly reveal circumstances which render his trial and conviction violative of the Federal Constitution, and that in any event, the uncontroverted allegations together with his additional allegations which he was never given an opportunity to prove in the Court below clearly bring his case squarely within the controlling precedents of this court in which the totality of the circumstances surrounding the trials involved were held to result in a denial of the Due Process guaranteed by the Fourteenth Amendment.

II.

The Circumstances of Petitioner's Conviction Render It Contrary to the Fourteenth Amendment Guarantee of Due Process of Law.

A. Denial of Counsel to an Illiterate Defendant Such as Petitioner Deprives Such a Defendant of a Fair Opportunity to Defend Himself Successfully Against Serious Criminal Charges.

A brief examination of relevant portions of the record, including the transcript of testimony at petitioner's trial, establishes without question that in fact petitioner was not represented by counsel at his trial, and that in fact peti-

* Although as noted in *Herman* v. *Claudy*, 350 U.S. 116, and *Uveges* v. *Pennsylvania*, 335 U.S. 437, some members of this court adhere to the proposition that under the Sixth and Fourteenth Amendments counsel is required in every criminal case, a majority of this court has never adopted that view.

tioner is illiterate. The Florida Supreme Court disposes of the lack of counsel by reciting that counsel is not required in other than capital cases. In so holding it makes no reference whatsoever to the numerous decisions of this court which clearly establish that in a non-capital case the circumstances may be such that a fair trial cannot be conducted without the aid of counsel. The Florida Supreme Court disposes of the uncontroverted fact of petitioner's illiteracy with a conclusion that even the illiterate may be intelligent "about many of the commonplace things of life". It is respectfully submitted, however, that a criminal trial involving a felony charge with possible consequences involving imprisonment of the defendant for twenty years is hardly one of the "commonplace things of life" which any illiterate should be clearly capable of handling on his own behalf without assistance.

The oft quoted language of Mr. Justice Sutherland in *Powell* v. *Alabama*, 287 U.S. 45, seems particularly relevant to this case. He said:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his

innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." (287 U.S. 45, 69.)

This court has on numerous occasions considered situations in which it was apparent that the defendant faced with criminal prosecution was, by reason of mental incapacity, extreme youth, or the manner in which the proceedings against him were conducted, unable adequately to defend himself. In *Powell* v. *Alabama*, *supra*, the defendants were illiterate. As noted by Mr. Justice Reed in his opinion in *Uveges* v. *Pennsylvania*, 335 U.S. 437, the age and education of the accused are among the various circumstances which may indicate that counsel is essential to a fair hearing. The education of the defendant was considered in *Demeerleer* v. *Michigan*, 329 U.S. 663, in *Wade* v. *Mayo*, 334 U.S. 672, and in *Cash* v. *Culver*, 358 U.S. 633. In *Moore* v. *Michigan*, 355 U.S. 155, the defendant was a seventeen year old negro with a seventh grade education; in *Massey* v. *Moore*, 348 U.S. 105, it appeared that the defendant's mental capacity at the time of trial might have been such that he was unable to defend himself.

There can be no question, in view of these cases, that the mentality of the defendant is a factor to be considered, as is the extent of his education, in determining whether a fair trial could result in the absence of aid from counsel. In the present case there is no dispute as to petiitoner's illiteracy, and the argument advanced in the opinion of the Florida Supreme Court that some illiterate persons may accumulate such funds and have such standing that a bank will honor their cross mark without question, has little relevance to the ability of such an individual to defend himself in a serious criminal trial.

B. Denial of Counsel Is Particularly Harmful Where the Accused Pleads Not Guilty and a Trial Is Held, and This Court Has Consistently Held With the Possible Exception of *Betts* v. *Brady*, 316 U.S. 455, in Cases Involving Such Factual Circumstances, That Appointment of Counsel Is Essential.

In a majority of the cases considered by this court involving the problem of lack of counsel in a State criminal prosecution, it appears that the defendant in each instance had pleaded guilty to the charges against him. *Smith* v. *O'Grady*, 312 U.S. 329, *Williams* v. *Kaiser*, 323 U.S. 471, *Tomkins* v. *Missouri*, 323 U.S. 485, *Rice* v. *Olson*, 324 U.S. 786, *Canizio* v. *New York*, 327 U.S. 82, *Demeerleer* v. *Michigan*, 329 U.S. 663, *Foster* v. *Illinois*, 332 U.S. 134, *Gayes* v. *New York*, 332 U.S. 145, *Marino* v. *Ragen*, 332 U.S. 561, *Bute* v. *Illinois*, 333 U.S. 640, *Townsend* v. *Burke*, 334 U.S. 736, *Uveges* v. *Pennsylvania*, 335 U.S. 437, *Quicksall* v. *Michigan*, 339 U.S. 660, *Palmer* v. *Ashe*, 342 U.S. 134, *Herman* v. *Claudy*, 350 U.S. 116, *Moore* v. *Michigan*, 355 U.S. 155. In a minority of the cases the defendant has entered no guilty plea, and has been faced with the necessity for conducting his own defense at the trial itself. *Betts* v. *Brady*, 316 U.S. 455,* *Wade* v. *Mayo*, 334 U.S. 672, *Gibbs* v. *Burke*, 337 U.S. 773, *Massey* v. *Moore*, 348 U.S. 105, *Hudson* v. *North Carolina*, 363 U.S. 697, *McNeal* v. *Culver*, 365 U.S. 109, *Cash* v. *Culver*, 358 U.S. 633. In each of these cases, with the sole exception of *Betts* v. *Brady*, *supra*, this court found factual allegations which constituted a denial of Fourteenth Amendment guarantees.**

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* In *Betts* v. *Brady*, it appears that the defendant conducted his own defense in a trial before a judge without jury.

** In *Gryger* v. *Burke*, 334 U.S. 728, the petitioner had been sentenced as an habitual criminal after admitting eight prior convictions. It is not clear from the opinion of the court whether any "trial" took place, but it appears in any event that the petitioner in effect pleaded guilty by admitting the previous convictions.

In *Gibbs* v. *Burke*, *supra*, Mr. Justice Reed specifically noted:

> "A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty." 337 U.S. 773, 781.

In the *Gibbs* case, notwithstanding the age of the defendant (thirty-four years) and evidence that some courtroom experience might have been gained by the defendant by virtue of prior convictions, this court held that the circumstances of the trial amounted to a denial of due process. Specifically noted were the admission of inadmissible hearsay and incompetent evidence as well as errors at the trial with respect to making the prosecuting witness petitioner's witness, denying petitioner the right to show that the prosecuting witness had previously made a baseless criminal charge against him, and references by the trial judge to petitioner's prior convictions in the presence of the jury. It seems clear that in the trial of any criminal cause numerous questions of evidence and procedure are likely to arise and to some extent will inevitably arise. To hold that a layman, regardless of his education, is adequately equipped to deal with these questions, is to ignore reality. It is respectfully suggested that this court could properly rule, consistent with all of its previous decisions, with the possible sole exception of *Betts* v. *Brady*, *supra*, that in any criminal trial where there is a plea of not guilty and a trial is necessary, due process requires that the lay defendant be provided with counsel unless he intelligently and competently waives such assistance. Narrowing of the rule to encompass only jury trials, and not trials where a jury is properly waived, would be consistent not only with *all* of the previous decisions of this Court excluding *Betts* v. *Brady*, but would also be consistent with the *Betts* holding.

C. In Any Event, the Ignorance of Petitioner and His Inability to Present any Defense on His Own Behalf Are Apparent From the Record.

Even though it be not agreed that in *every* criminal case the complexities of a trial require the assistance of counsel for a lay defendant unable to provide his own counsel, it must necessarily be agreed that in the case of this illiterate defendant, such assistance was essential. The ignorance of defendant with respect to the issues involved in properly presenting a defense to the charges against him is apparent from the transcript of testimony at the trial. The only participation of the defendant and his wife revealed by the transcript other than their cross-examination by the prosecution, is shown at the following pages of the record: 31 and 32, 41, 47-49, 52-54, 57-59. A typical illustration of the ability of the defendant and his wife in conducting their defense is revealed by page 41 of the record. At the conclusion of the testimony on direct examination of the prosecuting witness, petitioner's daughter, the following occurred:

> "The Court: Mr. Carnley, did you wish to cross examine the witness? Do you wish to interrogate the witness concerning what she has testified to?
>
> Mr. Willard Carnley: Yes, sir.

Cross Examination by Mr. Willard Carnley:

Q. Carol Jean, you say your mother, she went and made arrangements to get the casket for your sister?

A. Yes.

Q. You are right sure now that she did?

A. I am sure.

Q. Well, I will tell the Court, my wife was out at Mr. Joe Gayfer's house—

The Court: Wait a minute, sir, you are testifying. (fol. 45) You will have a chance to testify when the State rests. Any questions you wish to ask your daughter, you are welcome to do it.

Cross Examination by Mrs. Pearl Carnley:

Q. Carol Jean, don't you recall after you got age of maturity that Mother tried to tell you right from wrong and always teach you right from wrong?

A. Yes, you have taught me right from wrong.

Thereupon the witness was excused."

This constituted the entire cross-examination of the prosecution's major witness against the defendant. The only other witness called by the prosecution was petitioner's son. Page 47 of the record reveals that the petitioner asked no questions in cross-examination of this witness.

After being advised of his right to testify or not to testify at the conclusion of the State's case, the following occurred:

"The Court: Mr. Carnley, would you like to take the witness stand?

Mr. Carnley: I would love to say one more thing.

The Court: Wait a minute, sir. Do you wish to take the witness stand and testify?

Mr. Carnley: Yes, sir.

(fol. 56) Willard Carnley, a witness in his own behalf, who after being first duly sworn testified as follows:

The Court: Face the Jury, sir, and testify. You are free to testify now, Mr. Carnley.

Mr. Carnley: Well, what I had now, the children, they was talking about that I didn't come to see them.

I come to see them as many times as I could while they was out there. I went out there, and Glenn, he was sick and was crying, and I was hurt over them taking my children and I got mad there at that woman and kind of popped off a little bit, so she called Judge Bruno, and Judge Bruno told her to not let me come out there to see the children no more. Well, then I taken and told my wife I couldn't live in a country where I couldn't see my children. I went to work at a milk dairy and every other week I would give ten dollars to a fellow to bring my wife over here to see the young ones. She could see them, but they wouldn't let me see them. Well, I was only making twenty-five dollars a week. Of course, we was getting all our milk. I would just take milk from the milk dairy and everything, and this here about the girl, I ain't never handled my daughter in no disorderly respect, and they played hookey a lots from school. When they was going to school, we would send them and they wouldn't go. They didn't have to ride the bus with the other young ones because they went to one school and they went to the other and they played hookey. We sent them to school and we thought they had went and they hadn't. And (fol. 57) during the time that my wife says she seen her last period, well, there was a family of folks lived down the road from there. His wife was sick and they had a little baby, too, and my wife let the daughter go down there every morning early and cook for them and wait on them for about two weeks or maybe approximately a little longer. When she come back home, she would grab a magazine or something or other and read until about dark and she was getting ready then to go and watch television, that's all that she did, television, and we let her go. Sometimes she would go one way and sometimes she would

go the other way to watch television and sometimes she would come back at nine o'clock or eleven or eleven-thirty, and I told my wife I believed we were letting her go a little too much, and she said, 'No, they are getting old enough to have a little bit of privilege,' and so I didn't think nothing else about it, and as far as me knowing anything about it, I didn't know until my wife come back and told me about it. We was working, trying to get straightened out, trying to get a lawyer to get my children back, and that is all I have to say."

The foregoing is set forth at length only because it vividly illustrates the patent inability of petitioner to conduct any defense on his own behalf. Whether *with* the aid of counsel petitioner would have been able to present a successful defense can of course not now be determined with certainty; there can be no doubt, however, that *without* the aid of counsel this defendant was totally incapable of handling his defense, and that the jury verdict of guilty was a foregone conclusion.

D. The Character of the Charges Against Petitioner Emphasize the Necessity of Furnishing Him With Counsel.

The nature of the charges against petitioner are also significant in any consideration of the totality of circumstances surrounding his trial. It is obvious that these charges were more than serious; they were of the type which most citizens would consider particularly repulsive, and which could be readily expected to disgust and revolt the ordinary juror. Under such circumstances it is particularly important that the rights of the accused be zealously guarded. The Florida Supreme Court itself has recognized in considering an incest prosecution involving

the uncorroborated testimony of the prosecuting witness, that it is imperative in such cases that the accused be accorded every right designed by law to protect the liberties with which the citizen is clothed. *Knight* v. *State*, 97 So. 2d 115 (Fla., 1957).

E. Complex Legal Questions Were Potentially or Implicitly Involved in Petitioner's Trial Which Required the Assistance of Counsel.

Although petitioner believes it is clear that the circumstances discussed thus far without more, are sufficient to show clearly a denial to him of the guarantees of the Fourteenth Amendment, it should also be noted that had counsel been appointed, there were present in this case, as in *McNeal* v. *Culver*, 365 U.S. 109, *Reynolds* v. *Cochran*, 365 U.S. 525, and *Gibbs* v. *Burke*, 337 U.S. 773, a number of complex legal questions.

Respondent's return to the petition for habeas corpus filed in the Florida Supreme Court alleged that the sentence imposed upon petitioner was within the maximum prescribed by law inasmuch as Section 801.02, Florida Statutes, provides that the crimes of "incest" and "fondling" (lewd and lascivious behavior) when committed with a person fourteen years of age or under shall be included under the provisions of Chapter 801 of the Florida Statutes, and Section 801.03(1)(a) provides that anyone convicted of an offense within the meaning of Chapter 801 may, in the discretion of the trial judge, be sentenced to a term not to exceed twenty-five years in the state prison (R. 15 and 16). The Florida Supreme Court opinion contains a similar statement (R. 74). It thus clearly appears that respondent and the Court below viewed petitioner's alleged crimes as falling within the provisions of Chapter 801 of the Florida Statutes. That Chapter, known as the Florida

Child Molester Law, has a number of other provisions which counsel for petitioner, had there been such at his trial, might have invoked. For example, Section 801.10 provides in relevant part:

> "When any person is charged with an offense within the purview of this chapter, said person may petition the court for a psychiatric and psychological examination as heretofore set out and the written report shall be filed with the clerk of the court having jurisdiction of the offense for the purpose of assisting the court in the trial of the case . . . ."

Section 801.03 (1) (b) specifically authorizes the trial judge, when any person has been convicted of an offense under Chapter 801, to:

> "Commit such person for treatment and rehabilitation to the Florida state hospital, or to the hospital or the state institution to which he would be sent as provided by law because of his age or color provided the hospital or institution possesses a maximum security facility as prescribed by the board of commissioners of state institutions. When, as provided for in this law, there shall have been created and established a Florida research and treatment center, then the trial judge shall, instead of committing a person to the Florida state hospital, commit such person instead to the Florida research and treatment center. In any such case the Court may, in its discretion, stay further criminal proceedings or defer the imposition of sentence pending the discharge of such person from further treatment in accordance with the procedure as outlined in this chapter".

Section 801.08 gives the trial judge under whose jurisdiction a conviction is obtained pursuant to the Chapter authority to suspend the execution of judgment and place the defendant upon probation. In short, had counsel been appointed to represent the petitioner, it is possible that some of the opportunities provided under Chapter 801, obviously designed for rehabilitation of persons charged with offenses thereunder, might have provided assistance for petitioner.

If in fact, as suggested by respondent in his return and by the opinion of the court below, petitioner was convicted on both counts and sentenced pursuant to Chapter 801, it is also possible that counsel for petitioner might have challenged the constitutionality of this act on grounds similar to those which were successfully invoked by the State in *Copeland* v. *State*, 76 So. 2d 137 (Fla., 1954). In that case the defendant was convicted of rape in the trial court and sentenced to death pursuant to Section 794.01 of the Florida Statutes. On appeal the defendant challenged the validity of his conviction and the jurisdiction of the court where he was tried on the ground that Chapter 801, the Florida Child Molester Law, specifically included in Section 801.02 the crime of rape when committed with a person fourteen years of age or under, and by Section 801.03 made the *maximum* penalty for any crime covered by the Chapter twenty-five years in the state prison. In upholding the conviction, the Florida Supreme Court ruled that insofar as applied to rape and the penalty therefor, the provisions of the Child Molester Law were contrary to the State Constitution, citing three grounds: 1) The Chapter embraced eleven different crimes denounced by other Statutes of the State of Florida; 2) It did not publish at length the Statutes with reference to rape which it attempted to amend; and 3) The title of the act was insufficient to give notice that

one of the purposes of the act was to change the penalty for rape.*

Since the *Copeland* case the Florida Supreme Court has not had occasion to consider directly the validity under the State Constitution of the Child Molester Law as applied to other crimes, though a Florida District Court of Appeal did have occasion to consider the question in *Buchanan* v. *State*, 111 So. 2d 51 (Fla. App., 1959) and upheld the law as applied to the crime of lewd and lascivious conduct. The point of this discussion is not to establish with certainty that counsel for petitioner at his trial could have successfully attacked the constitutionality of the Child Molester Law as applied to petitioner;** the point is rather that there were complex legal problems either implicitly or potentially involved which it is clear that petitioner without aid could not present.

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* Subsequent to the *Copeland* case Section 801.02 was amended to exclude rape from the crimes included thereunder. See Chapter 29923, Laws of Florida, Acts of 1955.

** It appears likely that, notwithstanding the reference by respondent in his return and the opinion of the Court below, it would have developed that insofar as the first count against petitioner (the count charging incest) was concerned, the provisions of the Child Molester Law have no application at all, inasmuch as that law did not include the crime of "incest" within the definition contained in Section 801.02 until amended by the legislature by Section One, Chapter 57-1990, effective December 8, 1957, a date more than one month after petitioner's arrest and almost five months after the alleged criminal act. Accordingly, it seems probable that notwithstanding the opinion below, the "incest" count was based solely on Section 741.22 of the Florida Statutes, while the "fondling" (lewd and lascivious behavior) charge of the second count presumably fell within the language of Section 801.02, "incorporating" Section 800.04 of the Florida Statutes. The relationship between Sections 800.04 and 801.02 is far from clear. The first Section purports to deal with "lewd, lascivious behavior" relating to children under fourteen, while the other includes such behavior relating to children fourteen years of age or under. See also *Mueller, Criminal Law and Administration*, 35 N.Y. Univ. Law Review, 111, 112 (footnote 6).

Counsel for petitioner, had there been such, might also have given advice with respect to the advisability, under the circumstances, of petitioner and his wife testifying in their own behalf; it is certain that counsel could have questioned petitioner and his wife in a manner to elicit facts more germane to the issues involved than were forthcoming in petitioner's own statement set forth above. It is also possible that counsel could have subpoenaed other witnesses, or called other of petitioner's children to testify as to the circumstances involved; it seems certain that counsel could have explored in cross-examination of the State's only two witnesses the possibility of prejudice on the part of those witnesses against their parents arising out of previous difficulties suggested by the testimony.

Counsel clearly could have requested the court to instruct the jury in accordance with the instructions discussed in *Howell* v. *State*, 102 Fla. 612, 136 So. 456, reversed on rehearing on other grounds, 102 Fla. 612, 139 So. 187, where the court upheld charges concerning the ease of charging incest and the difficulty of proving it, and the relationship of the prosecuting witness to the defendant, and feelings which she might have against him. The court in petitioner's trial gave only general charges with respect to credibility of witnesses. It likewise seems clear that counsel would have been much better equipped to cross-examine the State's only two witnesses than were the defendants in the case, the witnesses' own father and mother.

It is unnecessary to dwell further on possible ways counsel might have assisted in defending the charges against petitioner. Suffice it to say, that contrary to the assertion of respondent in its return to petitioner's application for a writ of habeas corpus, numerous legal questions were either potentially or implicitly involved which were clearly beyond the ken of the ordinary layman, and *a fortiori*,

the illiterate layman. This court concluded in *McNeal* v. *Culver*, 365 U.S. 109, that Due Process of Law required that the petitioner there have the assistance of counsel at the trial of his case. In this case as in that one the gravity of the crime, coupled with the complicated nature of the offense charged and the possible defenses thereto, and the education and ability of the defendant, rendered the trial proceedings without counsel so apt to result in injustice as to be fundamentally unfair. In this case, it is clear that the petitioner does not merely lack education, he is illiterate.

III.

Denial of Counsel to an Indigent Defendant While According to Other Defendants an Unqualified Right to Counsel Results in a Denial of Due Process and Equal Protection to Such an Indigent Defendant.

Reference should also be made to the argument advanced by the concurring opinion in *McNeal* v. *Culver*, 365 U.S. 109, which was specifically excluded from consideration in the Court's opinion. In brief, that argument is that since *Chandler* v. *Fretag*, 348 U.S. 3, holding that the right of a defendant in a state criminal trial to be heard through his own counsel is unqualified, it must appropriately follow that the right of a defendant too poor to obtain his own counsel to be heard through court appointed counsel is similarly unqualified. To hold otherwise would be to tolerate a discrimination between rich and poor in the application of the criminal laws of a state, since the destitute defendant would be deprived of his "unqualified" right to counsel solely because of his poverty.

This court recognized in *Griffin* v. *Illinois*, 351 U.S. 12, that in the tradition of Magna Charta, "our own constitutional guaranties of due process and equal protection both

call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court'. *Chambers* v. *Florida*, 309 U.S. 227, 241. See also *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369." 351 U.S. 12, 17. In the present case petitioner alleged in his application for a writ of habeas corpus that he requested defense counsel (R. 2), and in his "Return to Respondent's Reply Brief" that he was "indigent" (R. 70). Thus there can be no question that the right of a state to deny the request of an indigent defendant for counsel was clearly raised and necessarily passed on by the court below. *Reynolds* v. *Cochran*, 365 U.S. 525, clearly reaffirmed the doctrine of *Chandler* v. *Fretag, supra.* In the light of this holding the rule announced in *Betts* v. *Brady*, 316 U.S. 455, can no longer be reconciled with the holding of *Griffin* v. *Illinois, supra*, where the opinion of Mr. Justice Black, joined by three other members of the Court, recognized that: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. 12, 19.

IV.

There Is No Necessity in View of the Facts Conceded by Respondent and Established by the Record for Remanding This Case for a Hearing on Petitioner's Allegations; Petitioner Is Entitled to Immediate Discharge From Custody.

In view of the uncontradicted fact of petitioner's illiteracy, and in view of the clearly established fact that petitioner was not represented by counsel at this trial, it is contended that there is no necessity in this case for a hearing in the Court below to determine the truth of petitioner's allegations. As in *Hudson* v. *North Carolina*, 363 U.S. 697, and *Gibbs* v. *Burke*, 337 U.S. 773, the record itself demonstrates the denial of Due Process and Equal Protection to petitioner. There is absolutely no suggestion in the record, nor does respondent affirmatively contend in its return to petitioner's application for a writ of habeas corpus, that petitioner competently or intelligently waived counsel.* Although respondent did deny petitioner's allegation that he requested counsel, this Court has never held that a timely request for assistance of counsel by an illiterate defendant,

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* Although it is noted that the Florida Supreme Court opinion makes reference to a "presumption" of waiver of counsel where the record shows the defendant did not have counsel, it is clear that no such "presumption" can prevail as against petitioner's clear allegation that he requested appointment of counsel and was refused. See *Herman* v. *Claudy*, 350 U.S. 116, *Moore* v. *Michigan*, 355 U.S. 155. See also *Johnson* v. *Zerbst*, 304 U.S. 458. If such a "presumption" were allowed no petitioner could raise a Constitutional claim involving deprivation of counsel without the aid of a record which affirmatively established that although counsel did not assist, the right was *not* waived. The record in this case reveals no advice by the trial court to petitioner as to his right to counsel, and no waiver by petitioner of any such right. For a case involving a similar recitation as to waiver in the court below, see *Rice* v. *Olson*, 324 U.S. 786.

ignorant of his rights in this regard, is an essential element in establishing that Due Process has been denied. See *Gibbs* v. *Burke*, 337 U.S. 773. Accordingly, it is respectfully submitted that the uncontroverted allegations alone establish petitioner's entitlement to the writ. Even if the uncontroverted allegations be deemed insufficient, however, it is clear, based on the foregoing discussion of the circumstances of petitioner's trial and conviction, that he was at least entitled to an opportunity for a hearing on the truth of his allegations. *Reynolds* v. *Cochrane*, 365 U.S. 525, *McNeal* v. *Culver*, 365 U.S. 109, *Herman* v. *Claudy*, 350 U.S. 116. The last cited decision makes clear the rule that mere *denial* of an allegation by prosecuting officials without an opportunity for a petitioner to prove his charge at a full hearing does not eliminate the necessity for such a hearing.

Conclusion

There is no question in this case that petitioner "is completely without education and cannot recount the ABC's" (R. 1). It is also clear that he was not represented by counsel in a serious criminal trial which resulted in his conviction and a sentence of up to twenty years in prison. A review of the transcript of testimony at petitioner's trial reveals his complete ignorance with respect to criminal procedure and the legal issues involved in his case, and makes apparent his complete inability to represent himself in the face of these charges. This Court has been zealous in its protection of the rights of the citizen, who, while protesting his innocence, is nonetheless forced to go to trial and defend himself without the aid of counsel against serious charges. In this case the charges are not only serious, they are of the type which are peculiarly repugnant to the average citizen. Under these circumstances it is particularly important that an accused be afforded every

right designed by law to protect the liberties of the citizen. It is submitted that the proceedings against petitioner cannot be squared with the guarantees of the Fourteenth Amendment denying the States the right to deprive any person of his liberty without due process of law, and guaranteeing all persons the equal protection of the laws. The judgment of the Court below must be reversed.

Respectfully submitted,

HAROLD A. WARD, III
WINDERWEEDLE, HAINES, HUNTER & WARD
Attorney for Petitioner

I HEREBY CERTIFY that a copy hereof has been furnished by mail to the Attorney General, State of Florida, attention of the Honorable James G. Mahorner, Assistant Attorney General, Tallahassee, Florida, this 1st day of September, A.D. 1961.

HAROLD A. WARD, III

Appendix

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 801.02, Florida Statutes, 1959:

> "Definitions.—An offense under the provision of this chapter shall include attempted rape, sodomy, attempted sodomy, crimes against nature, attempted crimes against nature, lewd and lascivious behavior, incest and attempted incest, assault (when a sexual act is completed or attempted) and assault and battery (when a sexual act is completed or attempted), when said acts are committed against, to or with a person fourteen years of age or under."

Section 801.03(1)(a) Florida Statutes, 1959:

> "Powers and duties of judge after convictions.—When any person has been convicted of an offense within the meaning of this chapter, it shall be within the power and jurisdiction of the trial judge to:
>
> (a) Sentence said person to a term of years not to exceed twenty-five years in the state prison at Raiford."

Section 801.03(1)(b) Florida Statutes, 1959:

> "Powers and duties of judge after convictions.—When any person has been convicted of an offense within the meaning of this chapter, it shall be within the power and jurisdiction of the trial judge to:

(b) Commit such person for treatment and rehabilitation to the Florida state hospital, or to the hospital or the state institution to which he would be sent as provided by law because of his age or color provided the hospital or institution possesses a maximum security facility as prescribed by the board of commissioners of state institutions. When, as provided for in this law, there shall have been created and established a Florida research and treatment center then the trial judge shall, instead of committing a person to the Florida state hospital, commit such person instead to the Florida research and treatment center. In any such case the court may, in its discretion, stay further criminal proceedings or defer the imposition of sentence pending the discharge of such person from further treatment in accordance with the procedure as outlined in this chapter."

Section 801.08, Florida Statutes, 1959:

"Execution of judgment may be suspended; probation; requirements.—

(1) The trial judge under whose jurisdiction a conviction is obtained may suspend the execution of judgment and place the defendant upon probation.

(2) The trial court placing a defendant on probation may at any time revoke the order placing such defendant on probation and impose such sentence or commitment as might have been imposed at the time of conviction.

(3) No defendant shall be placed on probation or continue on probation until the court is satisfied that the defendant will take regular psychiatric, psychotherapeutic or counseling help, and the individual helping the defendant shall make written reports at intervals of not more than six months to the court and the probation officer in charge of the case. The costs, fees and charges for treatment of defendant on probation shall not be a charge of the county where the defendant was tried."

Section 801.10, Florida Statutes, 1959:

"Examination; petition for, court order.—When any person is charged with an offense within the purview of this chapter, said person may petition the court for a psychiatric and psychological examination as heretofore set out and the written report shall be filed with the clerk of the court having jurisdiction of the offense for the purpose of assisting the court in the trial of the case. The court may, of its own initiative, or upon petition of an interested person, order such examination and report as heretofore set out."

Section 741.22, Florida Statutes, 1959:

"Punishment for incest.—Persons within the degrees of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void, who intermarry or commit adultery or fornication with each other, shall be punished by imprisonment in the state prison not exceeding twenty years, or in the county jail not exceeding one year."

Section 800.04, Florida Statutes, 1959:

"Lewd, lascivious or indecent assault or act upon or in presence of child.—Any person who shall handle, fondle or make an assault upon any male or female child under the age of fourteen years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without intent to commit rape where such child is female, shall be deemed guilty of a felony and punished by imprisonment in the state prison or county jail for not more than ten years."

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON 25, D. C.

OCTOBER TERM, 1961
No. 158

WILLARD CARNLEY,
Petitioner,

vs.

H. G. COCHRAN, JR.,
Director of the Division
of Corrections, Florida,
Respondent.

On Writ of Certiorari from the
Supreme Court of the State of Florida

BRIEF OF RESPONDENT

RICHARD W. ERVIN
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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

CASES

Constitutions and Statutes

IN THE SUPREME COURT
OF
THE UNITED STATES

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OCTOBER TERM, 1961

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BRIEF OF RESPONDENT

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are added to supplement the constitutional and statutory provisions submitted by the petitioner's brief:

Amendment V of the United States Constitution
Amendment VI of the United States Constitution

QUESTIONS PRESENTED

I

WHETHER PETITIONER MET THE BURDEN OF PROVING THAT ANY RIGHT TO COUNSEL WAS NOT WAIVED?

II

WHETHER THE UNEDUCATED PETITIONER WHO IS OF NORMAL INTELLIGENCE WAS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW WHEN CONVICTED OF A FELONY WITHOUT BEING OFFERED COUNSEL WHEN THE PROCEEDINGS WERE OTHERWISE FAIR?

STATEMENT OF THE CASE

The statement of the case submitted by petitioner is essentially accurate. It should be added that the Florida Supreme Court found from the certified transcript of testimony attached to respondent's return (R. 31), that petitioner actively participated in the conduct of the trial by interrogating witnesses, by making opening statements to the jury, and by making closing arguments to the jury; and, further, found from such transcript of testimony that the trial court instructed petitioner in regards to correct trial procedure and as to his constitutional rights (R. 74).

SUMMARY OF ARGUMENT

The submitted record of the trial below (R. 31-69) negates petitioner's allegations that he requested counsel;

and petitioner has, therefore, failed to meet the burden of proving by the preponderance of the evidence that he did not waive his alleged constitutional right to counsel (*Johnson vs. Zerbst*, 304 U. S. 458, Text 468, 82 L ed. 1461, Text 1468, 58 S. Ct. 1019). Even if arguendo, the petitioner did not waive his right to counsel the court's failure to appoint counsel, when unrequested to do so by petitioner, did not deny petitioner due process of law because the over-all proceedings were carried out in a fair and unbiased manner.

Although petitioner alleges that complex legal questions were involved in his trial, which questions might have been more ably raised by counsel, such point is rendered moot by the fact that the complexities were resolved in petitioner's favor. The fallacy of holding that the *Fourteenth Amendment* requires the appointment of counsel in criminal cases is revealed by the resulting absurdity that since loss of property and liberty are equally protected by the *Fourteenth Amendment*, the holding would necessitate the appointment of counsel in civil cases where indigent defendants were faced with property loss.

ARGUMENT

Point I

PETITIONER DID NOT PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT HE DID NOT WAIVE COUNSEL.

In the case of *Johnson vs. Zerbst*, supra, the Supreme Court of the United States held that in criminal cases originating in the federal courts, petitoner must prove by the preponderance of the evidence that he did not competently and intelligently waive his right to counsel in order to be entitled to a reversal of the Federal District

Court's opinion on the ground that the petitioner was not furnished with counsel. Such case or proposition was cited with favor in *Moore vs. Michigan*, 355 U. S. 155, 2 L ed. 2d 167, 78 S. Ct. 191. In the case of *Buckner vs. Hudspeth* (1939 Cir. Ct. App. 10th Kansas, 105 F. 2d 396), cert. den. 308 U. S. 553, 84 L ed. 465, 60 S. Ct. 99, petitioner was held to have waived his right to counsel by failing to request counsel even though he was not informed of such right by the court. The Supreme Court of the State of Florida held below that petitioner presumably waived his right to counsel (R. 74, 75) and such holding is in accord with the *Buckner vs. Hudspeth*, supra, decision. Certainly, if such presumption may be, or could have been entertained in a federal court, such presumption would be even more logically applied in state courts because a state court does not have the strict duty of furnishing counsel to indigent defendants in criminal cases that is required of the federal courts by the *Sixth Amendment*.

Point II

FAILURE TO APPOINT COUNSEL FOR AN ILLITERATE BUT OTHERWISE MENTALLY COMPETENT PETITIONER UNDER CIRCUMSTANCES WHERE COUNSEL WAS NOT REQUESTED DOES NOT DENY THE PETITIONER HIS LIBERTY WITHOUT DUE PROCESS OF LAW WHEN THERE IS NO OTHER PREJUDICIAL FACTOR IN PETITIONER'S FAVOR.

The court explained in detail to petitioner, at various stages of the trial, those legal rights to which he was entitled (R. 31, 32, 41, 47, 48, 52, 53, 57, 60, 61). Petitioner actively participated in the conduct of the trial by interrogating witnesses against himself and by making opening and closing statements to the jury (R. 32, 41, 48, 58, 59, 62).

In the case of *Betts vs. Brady*, 316 U. S. 455, 86 L ed. 1595, 62 S. Ct. 1252, this Court held that the requirements of counsel inherent in the *Fourteenth Amendment's* due process clause was not as rigid as the requirements in the *Sixth Amendment* and that, therefore, the *Fourteenth Amendment* was not violated by a court's refusal to appoint counsel to a defendant even though requested to do so and even though such defendant was a farmhand of similar rural background to the petitioner in the present case. The *Betts case*, supra, so closely parallels the present case that a holding adverse to respondent in the present case would necessitate an overruling of the *Betts case*, supra. However, a ruling in favor of respondent in the present case would not necessarily support the holding of *Betts vs. Brady*, supra, because such ruling could be on the ground that petitioner has not proven by the preponderance of the evidence that he did not waive counsel.

The rationale in *Betts vs. Brady*, supra, points out that the common law permitted defendant to employ counsel but did not require that the court appoint counsel when the defendant was unable to hire such counsel. It is the feeling of the respondent that the *Fourteenth Amendment* should be interpreted in light of the common law rule indicated by *Betts vs. Brady*, supra, and thus be held to guarantee that a defendant may hire counsel for himself but not to guarantee appointed counsel unless there are factors involved other than the poverty of the defendant.

If this Court were to interpret the *Fourteenth Amendment* due process of law provision as placing on the state the burden of appointing counsel in the present case, such interpretation would necessitate the state's appointing counsel not only in criminal cases but also civil cases. The *Fourteenth Amendment* requires due process of law in depriving one of life, liberty or property. Life and liberty

are the factors involved in a crimnal case. However, property is given equal standing in the *Fourteenth Amendment*. If the court were to fail to appoint counsel for an indigent litigant in a civil case that involves the property rights of such litigant, such failure to appoint counsel would have to constitute state action in denial of due process of law under the theory presented in *Shelly vs. Kramer*, 334 U. S. 1, 92 L ed. 1161, 68 S. Ct. 836. Therefore, the absurd result of holding the *Fourteenth Amendment* to require the state to appoint counsel in a criminal trial is that the state is required to appoint counsel in trials involving property rights while the federal government who is governed by the *Sixth Amendment* in the appointment of counsel continues its course free of such responsibility to appoint counsel in civil cases for indigent litigants who are in danger of losing property rights. This absurd result reveals that the proposition that the state must furnish counsel to indigent defendants is fallacious and supports the soundness of the rule requiring that the over-all proceedings be examined to ascertain whether they are within the limits of fairness required by the due process clause of the *Fourteenth Amendment*.

The rule that the characteristic of the over-all proceedings should be controlling rather than the fact of counsel's absence is supported by *Gallegos vs. Nebraska* (1951), 342 U. S. 55, Text 64, 96 L ed. 86, Text 94, 72 S. Ct. 141, wherein the failure to appoint counsel for an indigent, ignorant defendant was held not to violate due process when the over-all proceedings were fair. It should also be noted that the *Gallegos case*, supra, and *Betts vs. Brady*, supra, held that there must be circumstances in *excess* of the ignorance as well as the poverty of the defendant before failure to appoint counsel will violate the requirements of the *Fourteenth Amendment*. See also *Quicksall vs. Michigan* (1950), 339 U. S. 660, 94 L ed. 1188, 70 S. Ct. 910.

If the defendant has not reached his maturity *(Cash vs. Culver*, 358 U. S. 633, 3 L ed. 2d 557, 79 S. Ct. 432), or has a diagnosed mental deficiency such as imbecility (McNeal vs. Culver, 362 U. S. 910, 5 L ed. 2d 445, 81 S. Ct. 413), then such defendant would logically be entitled to counsel in a criminal case in the same manner as the court might appoint a guardian to assure against such defendant losing his property without due process of law. However, if the defendant is one who though uneducated might nevertheless serve in a position of public office (the present petitioner is qualified under the United States Constitution to be a candidate for president of the United States), vote, or act as a juror in convicting others, then such defendant should not be entitled to appointment of counsel in a criminal case any more than he would be entitled to appointment of counsel in a civil manner. Of course, as pointed out in *Chandler vs. Fretag*, 348 U.S. 3, 99 L ed. 4. S. Ct. 1, every defendant in a ciriminal case would have the same right to employ counsel and would have the opportunity to consult with such counsel in the same manner that a litigant would have the right to employ counsel in a civil case. See *Reynolds vs. Cochran*, 365 U. S. 525, 5 L ed. 2d 754, 81 S. Ct. 723. Of course, the defendant is entitled to a fair trial.

There were complexities involved in the proceeding as was so ably pointed out by petitioner's brief. However, the complexities raised were resolved in petitioner's favor. The issue that the two counts on which petitioner was convicted might possibly constitute only one crime was resolved in petitioner's favor when the court sentenced him to a term within the upper limits of the sentence for either of the counts (R. 7, 75). The issue that one of the counts might have constituted a crime within the terms of *Chapter 801, Florida Statutes*, was resolved in petitioner's favor when the court sentenced him to a term within the upper limits

of that count which was not subject to any attack. On Pages 17 and 18 of petitioner's brief, he referred to the importance of granting certain constitutional rights to defendants in cases involving the uncorroborated testimony of the prosecuting witness. The court should note that the testimony of Carol Jean Carnley is well substantiated by that of her brother, J. W. Carnley (R. 43-47). The case of *Bute vs. Illinois*, 333 U. S. 640, 92 L ed. 986, *68* S. Ct. *763* presented a charge identical to the present one to the United States Supreme Court. The Supreme Court in the *Bute case*, supra, found that the charge of taking indecent liberties with a girl of fifteen was not so complex as to require the appointment of counsel to the indigent defendant. As has already been pointed out, the complexities arising from the presence of two counts in the present charge that might distinguish such charge from *Bute vs. Illinois*, supra, were resolved in petitioner's favor when the court sentenced him to a term of six months to twenty years rather than to two consecutive terms of twenty years on each of the counts on which the petitioner was convicted.

As pointed out by counsel, the judge, under *Section 801.03 (1) (b), Florida Statutes*, could have committed petitioner for psychiatric treatment and rehabilitation and stayed the criminal proceedings. However, there is no inference in *Section 801.03*, supra, that the commitment should be in lieu of criminal punishment but, rather the inference is that such commitment shall be a prelude to such criminal punishment. The rendering of psychiatric treatment is completely within the discretoin of the judge and it would appear that counsel could have in no way facilitated the exercise of such discretion. Since the rendering of psychiatric treatment was dependent on the court's discretion, there was no right in petitioner to such treatment which could have been protected by competent professional counsel.

It is therefore submitted that there is no element of complexity existing in the present case which might have been decided more in favor of petitioner than was done so at petitioner's trial.

The transcript of the testimony of the trial (R. 31-69) reflects that the lower court was completely fair in its decorum to petitioner and guided petitioner by vocal direction through the criminal procedure necessary to present his defense.

The claim of denial of due process is based solely on the proposition that the court did not appoint counsel even though not requested to do so by the illiterate petitioner. Such fact in itself standing alone but surrounded by circumstances of a completely fair and unbiased trial shown by the transcript of record does not justify requiring the state that high degree of decorum which this sovereign has chosen to place on itself by a development through court decision of the terms of the *Sixth Amendment*.

CONCLUSION

It is submitted that because petitioner has failed to meet the burden of showing that he did not effectively waive counsel, the judgment of the Supreme Court of Florida should be affirmed.

It is further submitted that because petitioner's lack of counsel stands alone without any apparent unfairness in the proceedings, and because the record supports the proposition that the trial against petitioner was rendered in a completely fair manner, this Court should sustain the holding of the Florida Supreme Court and the procedure followed in the trial court.

Respectfully submitted,

H. G. COCHRAN, JR.,
Director of the Division
of Corrections, Florida,
Respondent.

.....

RICHARD W. ERVIN
Attorney General

.....

JAMES G. MAHORNER
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the aboye and foregoing Brief of Respondent has been furnished to the Honorable Harold A. Ward, III, Attorney at Law, Winderweedle, Haines, Hunter and Ward, P. O. Box 257, Winter Park, Florida, by mail, ... day of October, 1961.

.....

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 158

WILLARD CARNLEY,

Petitioner,

—v.—

H. G. COCHRAN, JR., Director of the Division of Corrections, Florida,

Respondent.

PETITIONER'S REPLY BRIEF

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INDEX

SUBJECT INDEX

AUTHORITIES

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 158

WILLARD CARNLEY,

Petitioner,

—v.—

H. G. COCHRAN, JR., Director of the Division of Corrections, Florida,

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PETITIONER'S REPLY BRIEF

Summary of Argument

The brief of respondent advances two major arguments in support of the ruling of the Court below: first, that petitioner did not prove that any right to counsel was not waived, and second, that failure to appoint counsel for petitioner, when not requested, did not, in the absence of any other prejudicial factor, result in a denial of rights guaranteed by the Fourteenth Amendment. A sufficient answer to both of these arguments is that petitioner alleged in his petition for writ of habeas corpus that he requested defense counsel and protested his inability to conduct a defense, but he was denied a hearing to prove the allegations of his petition. The trial record does not negate petitioner's allegation that he requested defense counsel, nor does it provide any factual basis for concluding that petitioner waived the assistance of counsel.

The Court below referred to a "presumption" of waiver in any case where the trial record shows that a defendant did not have counsel or fails to show whether he did or did not have counsel. No such presumption can be applied by a State, consistent with the Fourteenth Amendment, to overcome a clear allegation that appointment of defense counsel was requested. And in the present case, respondent's return to the petition for writ of habeas corpus did not allege that petitioner in fact waived counsel.

The circumstances of petitioner's trial, as set forth in detail in petitioner's brief on the merits, clearly required the appointment of defense counsel even if it be assumed, contrary to the allegation of the petition for writ of habeas corpus, that petitioner did not request such assistance. A timely request for appointment of counsel has never been required of an illiterate defendant facing serious criminal charges. The absence of counsel to assist petitioner at his trial, under the circumstances of this case, rendered the proceedings lacking in fundamental fairness and thereby deprived petitioner of his liberty contrary to the Fourteenth Amendment to the United States Constitution.

case is completely unlike *Buckner* v. *Hudspeth*, 105 F. 2d 396 (C.A. 10, 1939), cert. den. 308 U.S. 553, relied upon by respondent in his brief, where there were received in evidence depositions of a government investigating agent, of the Judge before whom the case was heard, of the Clerk of the Court, and of a Clerk in the United States Attorney's office, as well as testimony of the petitioner concerning the actual facts of the case.* In the present case there is nothing more than a denial by the respondent that petitioner requested counsel followed by a statement in the opinion of the Court below that wherever a record shows that a defendant did not have counsel or fails to show whether he did or did not have counsel, it will be "presumed" that he waived the benefit of counsel and elected to present his own defense.

If a State can be permitted to apply a "presumption" of waiver in circumstances where the convicted defendant clearly alleges that he requested counsel, where the record of the proceedings clearly does not contradict his allegation, and where there is nothing more than a denial of his allegation with no supporting proof and no opportunity at a hearing to determine the truth of the matter, then the guarantees of the Fourteenth Amendment have been stripped of much of their meaning. All that would be required in any case where the record showed lack of counsel or failed to show whether or not counsel appeared would be for the State to rely on a conclusive presumption that counsel was waived. It is respectfully submitted that no authority supporting the right of a State to apply such a presumption has been cited by respondent, and that in

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* The present case also differs from *Buckner* in that there the court was able to say: "The pleadings and briefs which the petitioner filed in his own behalf in the proceeding below show he is a man of intelligence and education." 105 F. 2d 396, 397.

fact no such rule has been recognized by this Court. This Court noted, in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, that: "'courts indulge every reasonable presumption against waiver'[12] of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"[13]

Petitioner *does not* urge that it is impossible for an accused competently and intelligently to waive his right to counsel (though there may be a serious question as to whether an illiterate accused can do so); petitioner *does* contend that the record in this case provides no basis whatsoever for either a determination or a "presumption" that counsel was waived, and that petitioner should at least be entitled to an opportunity to prove the allegations of his petition for writ of habeas corpus. It should be noted, however, that it is not essential under the decisions of this Court that petitioner establish as a prerequisite to his discharge from custody that in fact the assistance of counsel was requested; this fact is relevant only in considering whether petitioner can be said competently and intelligently to have waived counsel, and it is of course clearly not determinative of that issue.

As noted in Part IV of petitioner's brief on the merits there was no allegation in respondent's return to the petition for writ of habeas corpus that petitioner competently or intelligently waived counsel, and there would appear to be no basis for suggesting a waiver other than by means of the "presumption" referred to by the Court below. Respondent's brief here makes no reference to any portion of the record dealing with the matter. Petitioner again submits, therefore, that he is entitled to immediate discharge and that there is no necessity for remanding this case for a hearing on the truth of his allegations. The record establishes without contradiction petitioner's illit-

eracy, his lack of counsel at the trial, the inflammatory nature of the charges against him, and his inability to conduct any defense without assistance.

II.

The Circumstances of Petitioner's Conviction Were Such That the Absence of Counsel Resulted in a Denial to Him of That Degree of Fairness Required by the Fourteenth Amendment to the Constitution, Even Though It Be Assumed, Contrary to the Clear Allegation of His Petition for a Writ of Habeas Corpus, That Defense Counsel Was Not Requested.

Petitioner's illiteracy, the prejudicial nature of the charges against him, his obvious ignorance and inability to defend himself, and the complex nature of the legal questions involved at his trial have been sufficiently set forth in petitioner's brief on the merits. Respondent contends, however, that notwithstanding these factors, "a holding adverse to respondent in the present case would necessitate an overruling of the *Betts* case, supra" (*Betts* v. *Brady*, 316 U.S. 455) (Respondent's Brief, Page 5). Such a contention ignores the numerous differences between the facts involved in *Betts* v. *Brady* and those of the instant case. There was no evidence in *Betts* v. *Brady* that the defendant was illiterate or otherwise unable to defend himself. This Court noted that the defendant was of ordinary intelligence and ability and had once before been in a criminal court. The charge involved in that case was robbery, a crime less likely to inflame the emotions than the crime of incest. There was no suggestion that legal complexities were involved, and trial was before a judge without a jury. Moreover, the accused was not faced with the necessity of successfully cross-examining his own children in order to establish his innocence.

In view of the requirement that all facts and circumstances be examined in each case involving an alleged denial of Fourteenth Amendment guarantees, petitioner does not contend that a holding against him in the present case would necessarily involve the overruling of other decisions of this Court. It must be noted, however, that the undisputed circumstances of petitioner's trial would seem at least as lacking in fairness as those of other cases in which this Court has found a denial of Constitutional rights. (See *Gibbs* v. *Burke*, 337 U.S. 773, *Cash* v. *Culver*, 358 U.S. 633, *Hudson* v. *North Carolina*, 363 U.S. 697, *McNeal* v. *Culver*, 365 U.S. 109.)

Respondent urges that to require the appointment of counsel in petitioner's case would necessitate appointment by the States of counsel in all civil cases. The argument apparently is that since life, liberty and property are each protected against certain State action by the Fourteenth Amendment, the elements of due process of law with respect to each must be identical. Even if it be conceded that State action is involved in recourse to the courts in all civil cases, the argument obviously overlooks the fact that what constitutes due process of law in each type of case may vary. It has long been recognized, for example, that in cases involving possible deprivation of life (capital cases), assistance of counsel must be supplied by the State regardless of the circumstances (*Powell* v. *Alabama*, 287 U.S. 45), whereas in cases involving possible loss of liberty (non-capital cases), no such requirement exists. *Betts* v. *Brady*, 316 U.S. 455. Respondent apparently urges that even though the elements of due process of law imposed upon a State may vary as between cases involving life on the one hand and liberty on the other, they may not vary as between cases involving liberty on the one hand and property on the other. The argument is obviously

not sound. It is thus apparent that a conclusion in this case that petitioner was deprived of Constitutional rights would not compel the conclusion that counsel must be furnished in all civil cases. In fact, even if it were to be held that in every case involving serious criminal charges counsel is required unless intelligently and competently waived, such holding would be consistent with denial of State-appointed counsel in civil cases.

Respondent urges that the overall proceedings surrounding petitioner's conviction must be examined, citing *Gallegos* v. *Nebraska*, 342 U.S. 55, and *Quicksall* v. *Michigan*, 339 U.S. 660. The petitioner is in complete accord with this proposition. As urged in his brief on the merits, the record of his trial in this case clearly reveals his total inability to present any defense without assistance, and shows, in the language of petitioner's application for a writ of habeas corpus, that he was "incompetent to conduct one single essential of a legal defense" (R. 3).

Respondent also urges that all the complexities involved in the trial proceedings were resolved in petitioner's favor. It is far from clear, however, that counsel might not have convinced the trial court to commit petitioner for treatment pursuant to Section 801.03(1)(b) Florida Statutes, and stay further criminal proceedings against him, or even to suspend execution of judgment against him pursuant to Section 801.08, Florida Statutes. It is clear, moreover, that the trial court had no opportunity to consider the constitutionality of Chapter 801 as applied to petitioner's case, if in fact the incest count was based on Chapter 801 as stated by the Florida Supreme Court in its opinion (R. 74). Petitioner clearly failed to receive the possible benefit of jury instructions such as were given in *Howell* v. *State*, 102 Fla. 612, 136 So. 456, reversed on re-hearing on other grounds, 102 Fla. 612, 139 So. 187, and he was deprived

of assistance in cross-examining his children and in presenting his own testimony. In all of these respects the trial court cannot be said to have resolved the issues in petitioner's favor.

In *Bute* v. *Illinois*, 333 U.S. 640, relied on by respondent, a single charge of "taking indecent liberties with children" was involved. There was no evidence to show a lack of intelligence or ability of the petitioner to understand the nature of the charges against him; there was no allegation that counsel had been requested; there was no indication that the defendant would have been confronted at a trial with the necessity of cross-examining his own children; and in fact it appears that the petitioner there persisted in a plea of guilty to the charge against him after a full explanation of the consequences of such a plea by the court. In all these respects the facts of that case differ from the present case.

The foregoing makes plain petitioner's need for the assistance of counsel at his trial. Respondent answers that petitioner did not request such assistance. Even if it be assumed that such was the case, this Court has never required a defendant, ignorant of his rights, to make such a request as a condition precedent to invoking the Constitutional safeguards. See *Uveges* v. *Pennsylvania*, 335 U.S. 437. It is obvious that such a rule would deprive those defendants in the greatest need of the required assistance.

Conclusion

There is no dispute that the charges against petitioner at his trial were both serious and of an inflammatory nature. There is no dispute that petitioner is illiterate and that he had no assistance of counsel in presenting his defense. The argument of respondent in this Court is that petitioner failed to request counsel, and that since he had no counsel, he must be presumed to have waived such assistance. In the absence of any allegation or evidence that counsel was competently and intelligently waived a State cannot indulge a "presumption" of such a waiver.

Respondent's return to the petition for writ of habeas corpus did not allege a waiver by petitioner of the assistance of counsel. Under these circumstances petitioner respectfully submits that the undisputed facts of his trial clearly render his conviction lacking in that fundamental fairness required by the Fourteenth Amendment to the United States Constitution and entitle him to immediate discharge. In any event, petitioner submits that the allegations of his petition for writ of habeas corpus were sufficient to require the Court below to conduct a hearing with respect thereto, and in the absence of evidence that he competently and intelligently waived the right to assistance of counsel, established his right to immediate discharge.

Respectfully submitted,

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